United States Department of Labor
Employees' Compensation Appeals Board

ALMA E. DIXON, Appellant	)	
and	)	**Docket No. 03-1622**
	)	**Issued: February 23, 2004**
U.S. POSTAL SERVICE, POST OFFICE, New Orleans, LA, Employer	)	

Appearances:
Alma E. Dixon, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On June 9, 2003 appellant filed a timely appeal from a May 12, 2003 decision of the Office of Workers' Compensation Programs, which denied reconsideration of her claim and a February 19, 2003 decision of an Office hearing representative, which affirmed the termination of compensation benefits based on her refusal of suitable employment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation under 5 U.S.C. § 8106(c), effective June 3, 2002, based on her refusal to accept suitable employment; and (2) whether the Office properly denied reconsideration of her claim under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

The Office accepted appellant's claims for contusion and sprain to the left knee, lumbar sprain, contusion to both thighs, bilateral knee patellar dislocation and chondromalacia of the

right knee arising from August 27, 1984 and December 14, 1988 employment injuries. At the time of the 1984 injury, appellant was 44 years old and employed as a letter carrier. She was reassigned to a permanent light-duty position on February 28, 1987 as a modified distribution clerk. On August 12, 1991 appellant returned to work at a limited-duty mail clerk position for two hours a day and increased the number of hours worked to four hours a day on December 21, 1998. She received appropriate compensation for wages lost.

By letter dated December 31, 1998, the Office noted that appellant had been reemployed on December 21, 1998 as a limited-duty mail clerk and reduced her monetary compensation accordingly. In a decision dated February 22, 1999, the Office determined that appellant's wage-earning capacity was represented by her actual earnings as a limited-duty clerk, which she began on December 21, 1998 and, therefore, reduced her compensation in accordance with section 8115 of the Federal Employees' Compensation Act.

In progress notes dated April 1 and 13, 1999, appellant's treating physician, Dr. Stuart I. Phillips, a Board-certified orthopedic surgeon, advised that appellant should be able to work six hours a day and might be able to work eight hours per day within three months.

The Office referred appellant to Dr. Robert Shackleton, a Board-certified orthopedic surgeon, for a second opinion examination. In a June 25, 1999 report, Dr. Shackleton noted the history of injury and that appellant was only working four hours per day. He reviewed the medical records and presented his examination findings, noting that Dr. Phillips had diagnosed dislocation of both patellas with reflex sympathetic dystrophy of the knees. Dr. Shackleton determined that appellant had a bilateral knee condition, which would require restrictions in work activity but found no evidence of reflex sympathetic dystrophy and opined that appellant was able to work six hours per day and, as tolerated, graduate to eight hours per day. He advised that appellant could maintain her current restrictions and stated that any treatment was purely symptomatic.

In a December 16, 1999 report, Dr. Phillips reported that appellant was unable to perform her duties when the employing establishment tried to increase her work from four to six hours. He stated that appellant had total subluxation of the right patellofemoral joint on the left, severe medial joint line arthritis, bilateral osteoporosis and, reflex sympathetic dystrophy, which was sensitive to cold weather. He advised that appellant could only work four hours per day during the cold weather and stated that July weather might be a better time to attempt an increase in work hours.

The Office referred appellant to Dr. Walter R. Abbott, a Board-certified orthopedic surgeon, for another second opinion examination and evaluation of the medical record. In a report dated November 16, 2000, Dr. Abbott noted the history of injury and presented examination findings. He diagnosed chronic patellofemoral osteoarthritis of the left knee and opined that appellant was able to work an eight-hour day with her current restrictions on squatting, prolonged standing and prolonged walking. He opined that there was no evidence that her left knee needed surgery and further found no evidence compatible of a sympathetic dystrophy on the left side. The physician also disagreed with the use of narcotics for a chronic osteoarthritic condition.

Dr. Phillips continued to report that appellant would never be able to return to work a full eight hours per day due to degenerative arthritis, osteoporosis, recurrent subluxation of the kneecap and reflex sympathetic dystrophy.[1] Narcotic medication was prescribed for treatment.

To resolve the conflict in medical opinion between Dr. Phillips and the second opinion examiners, the Office referred appellant, together with a statement of accepted facts, questions to be answered and the medical record, to Dr. John R. Montz, a Board-certified orthopedic surgeon, for an impartial examination.[2] In an April 4, 2002 report, Dr. Montz noted the history of injury and that appellant had worked only four hours per day since 1991. Findings on examination were presented and Dr. Montz diagnosed bilateral patella femoral arthritis. He found no evidence that any lumbar condition related to a work-related injury had persisted and there were no lumbar complaints to justify a pathologic diagnosis. The physician advised that appellant's knee complaints and symptoms were, in part, related to the work injuries but stated that she would have developed osteoarthritic changes about both patellae even if no injury had occurred. Dr. Montz indicated that appellant's complaints were exaggerated as evidenced by her jumping off of the examining table to retrieve a magazine. He also found no evidence of reflex sympathetic dystrophy on examination. Dr. Montz opined that appellant could work eight hours a day with restrictions on walking extensive periods, squatting, running, climbing and kneeling. He advised that she would be unable to get in and out of a motor vehicle on a repetitive basis or use a standard transmission. He further restricted lifting, pushing and pulling to 25 pounds. The physician opined that appellant had reached maximum medical improvement, that there was no justification for additional orthopedic treatment and that the use of narcotic medication should be discontinued.

By letter dated April 29, 2002, the employing establishment offered appellant the position of modified distribution clerk, eight hours a day, effective May 6, 2002. The job was stated to be a sedentary position, which required occasional standing and walking not to exceed one hour. No kneeling was required and lifting was limited to 10 pounds. The job duties included returning unclaimed articles and completing appropriate form; returning certified mail and parcel; clerical work, which involved filing and answering telephones; and stocking the lobby with supplies.

The Office advised appellant, by letter dated April 29, 2002, that the offered position was determined to be suitable work. Appellant was given 30 days either to accept the offered position or offer reasons as to why the offered position was not suitable for her. The Office advised appellant of the penalty provision for refusing suitable work under section 8106(c)(2) of the Act and gave her 30 days in which to respond.

In an email response sent May 13, 2002, appellant referred to missed appointments in the scheduling of the impartial medical examiners in this case and contended that Dr. Montz's report contained many lies and he exaggerated many of his statements and observations.

[1] Reflex sympathetic dystrophy has not been accepted as being an employment-related condition.

[2] The record reflects that appellant was originally scheduled with Dr. A.J. French, a Board-certified orthopedic surgeon, but after several rescheduled appointments the Office referred appellant to Dr. Montz.

In a May 7, 2002 report, Dr. Phillips noted that his disagreement with Dr. Montz's report including his assessment of patellofemoral arthritis. He advised that appellant had reflex sympathetic dystrophy for a long period of time and when Dr. Montz evaluated appellant, the weather was warm, noting that in winter appellant's leg was much worse, characteristic of reflex sympathetic dystrophy. Physical examination of appellant's leg revealed a cold leg in the area of the infrapatellar branch of the medial saphenous nerve. The physician suggested that a thermogram and bone scan with camera views of the knee should be done to correctly evaluate appellant's condition. He noted his agreement with Dr. Montz's assessment of severe patellofemoral arthritis. Dr. Phillips opined that appellant had objective findings of reflex sympathetic dystrophy along with objective evidence of patellofemoral arthritis and could only work four hours per day. He stated that he tried to increase her hours, but it had always aggravated her condition.

In a decision dated June 3, 2002, the Office terminated appellant's compensation effective that day on the grounds that she refused a suitable job offer as a modified distribution clerk without justified reasons.

On July 1, 2002 the Office received a letter from appellant requesting a hearing. A hearing was held on November 22, 2002 where appellant testified that she was working eight hours because she needed the money. She further testified about her job duties and stated that she very seldom sat down as she was constantly coming and going. Appellant further stated that she had additional duties since she began working the eight hours, pulling racks and sacks and loading trays, along with counting money. Appellant advised that she is on constant medication, which makes her sleepy, dizzy or sick and that she felt this was a safety hazard. She further advised that she got daily injections in her knees from Dr. LaMeel.[3]

Appellant also submitted a June 11, 2002 report, in which Dr. Phillips reiterated his diagnosis of reflex sympathetic dystrophy and that her symptoms are worse in the winter. In a September 3, 2002 report, Dr. Phillips noted that appellant was working eight hours a day, that she was fatigued regularly and had increased pain and had to miss several days of work. He noted that she stated that her job was more than a desk job as she had to walk and lift things regularly. He noted that on examination appellant's leg was cold, a finding suggestive of reflex sympathetic dystrophy. Dr. Phillips again recommended that objective testing be performed and suggested that she should not work eight hours. He recommended that appellant be in a managerial job, which did not require much physical effort and advised that appellant should exercise regularly and attend physical therapy. In an October 1, 2002 report, Dr. Phillips noted that appellant's pain was increasing and that she had less tolerance for long-standing, walking or bending. He opined that appellant should not work more than four to six hours a day because of her increasing symptoms. Objective testing to ensure the diagnosis of reflex sympathetic dystrophy was recommended again. In October 29 and December 10, 2002 reports, Dr. Phillips continued to diagnose recurrent subluxation of the patellofemoral joints and reflex sympathetic dystrophy. He advised that because of her residual reflex sympathetic dystrophy he did not believe that appellant could work an eight-hour day on a regular basis. He stated that the stress of working plus cold weather made the problem worse.

[3] The record is devoid of any evidence of appellant receiving weekly injections from a Dr. LaMeel.

By decision dated February 19, 2003, an Office hearing representative affirmed the Office's June 3, 2002 decision, finding that the termination of benefits based on a refusal of suitable employment was proper.

In a letter dated March 10, 2003, appellant requested reconsideration. She indicated that a physician's appointment had been scheduled for May 9, 2003. Progress reports from Dr. John J. Watermeier, a Board-certified orthopedic surgeon, dated March 5 and April 2, 2003, noting that degenerative joint disease of both knees were included. By decision dated May 12, 2003, the Office denied merit review of appellant's claim.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation, including cases, in which the Office terminates compensation under section 8106(c) for refusal to accept suitable work.[4]

Under section 8106(c)(2) of the Act,[5] the Office may terminate compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[6] However, to justify such termination, the Office must show that the work offered was suitable,[7] and must inform the employee of the consequences of a refusal to accept employment deemed suitable.[8] 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.[9]

Section 10.516 of the Code of Federal Regulations states that the Office will advise the employee that the work offered is suitable and provide 30 days for the employee to accept the job or present any reasons to counter the Office's finding of suitability.[10] Thus, before terminating compensation, the Office must review the employee's proffered reasons for refusing or neglecting to work.[11] If the employee presents such reasons and the Office finds them unreasonable, the Office will offer the employee an additional 15 days to accept the job without penalty.

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[4] 5 U.S.C. § 8106(c); *Henry W. Sheperd, III*, 48 ECAB 382, 385 (1997); *Shirley B. Livingston*, 42 ECAB 855, 861 (1991).

[5] 5 U.S.C. § 8106(c)(2).

[6] *Martha A. McConnell*, 50 ECAB 129, 131 (1998).

[7] *Marie Fryer*, 50 ECAB 190, 191 (1998).

[8] *Ronald M. Jones*, 48 ECAB 600, 602 (1997).

[9] *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[10] 20 C.F.R. § 10.516.

[11] *See Maggie L. Moore*, 42 ECAB 484, (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

Once the Office establishes that the work offered was suitable, the burden of proof shifts to the employee who refuses to work to show that such refusal or failure to work was reasonable or justified.[12] The issue of whether an employee has the physical ability to perform the duties of the position offered is a medical question that must be resolved by medical evidence.[13]

ANALYSIS -- ISSUE 1

In the present case, the Office terminated appellant's compensation on June 3, 2002 on the grounds that she refused an offer of suitable work. The Board notes that prior to terminating appellant's compensation on June 3, 2002 the Office had issued a formal loss in wage-earning capacity decision on February 22, 1999, in which it determined that appellant's employment as a limited-duty mail clerk on December 21, 1998 represented her wage-earning capacity.

Once the wage-earning capacity of an injured employee is properly determined, it remains undisturbed regardless of actual earnings or lack of earnings.[14] A modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was in fact erroneous.[15] The burden is on the Office to establish that there has been a change so as to affect the employee's capacity to earn wages in the job determined to represent his earning capacity. Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.[16] In addition, Office procedure further provides that the party seeking modification of a formal loss in wage-earning capacity decision, has the burden to prove that one of these criteria has been met. If the Office is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved, or that the claimant has been vocationally rehabilitated.[17]

As the Office had issued a formal loss in wage-earning capacity decision on February 22, 1999 prior to terminating appellant's compensation on June 3, 2002 on the grounds that she refused an offer of suitable work, the Office did not follow its own case law and procedure regarding appellant's wage-earning capacity prior to terminating her compensation. The Office did not address its prior formal loss in wage-earning capacity decision or otherwise modify this

[12] 20 C.F.R. § 10.517(a); *Deborah Hancock*, 49 ECAB 606, 608 (1998).

[13] *See John E. Lemker*, 45 ECAB 258 (1995); *Marilyn D. Polk*, 44 ECAB 673, 680 (1993); *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

[14] *Roy Mathew Lyon*, 27 ECAB 186, 189-90 (1975).

[15] *Elmer Strong*, 17 ECAB 226, 228 (1965).

[16] *Ronald M. Yokota*, 33 ECAB 1629, 1632 (1982).

[17] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11 (July 1997).

loss in wage-earning capacity decision, which was in place at that time that it made its suitable work determination.[18]

Moreover, the Office did not act in accordance with its procedures, which provide that following the submission of a claimant's response to a finding of suitability, the claims examiner is to determine whether the reasons for refusing the job are valid. If the reasons for refusing the job are not deemed justified, then the employee must so be advised and allowed 15 additional days to accept or reject the job.[19] Appellant submitted a May 7, 2002 report from her treating physician, Dr. Phillips and an email dated May 13, 2002. The Office did not respond to appellant to advise that any reasons submitted were insufficient or provide her with a letter giving her 15 days to either accept or reject the offered position.

It is well established that there are procedural requirements that are attached to the provisions of section 8106(c). Essential due process principles require that a claimant have notice and an opportunity to respond prior to termination under section 8106(c).[20] These requirements apply to both refusal of suitable work determinations and to abandonment of suitable work determinations.[21] The record contains no evidence that the Office followed its established procedures prior to the June 3, 2002 decision. Appellant was not provided notice that her reasons were unreasonable or accorded an opportunity to accept the job without penalty within 15 days.[22]

Accordingly, the Board finds that the invocation of section 8106(c) under the facts of this case constituted error. The Office improperly terminated appellant's compensation, effective June 3, 2002, on the grounds that she refused an offer of suitable work and, therefore, the Office's decisions dated February 19 and May 12, 2003 are reversed.[23]

[18] In *Wallace D. Ludwick*, 38 ECAB 176 (1986), the Office issued a formal loss in wage-earning capacity decision, in which it determined that the employee's wage-earning capacity was represented by the position of deputy, a position which he had been performing. The Office then terminated the employee's compensation based on his refusal of a job, which had been offered by the employing establishment and determined by the Office to be suitable. The Board reversed the Office's termination indicating that the loss in wage-earning capacity decision had not been modified and that the employee's refusal of the offered position was justified by the work, which had been determined to represent his wage-earning capacity.

[19] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9a (December 1995).

[20] *Maggie L. Moore*, *supra* note 11.

[21] *See Mary A. Howard*, 45 ECAB 646 (1994).

[22] *See William M. Bailey*, 51 ECAB 197 (1999).

[23] As the Office's termination has been reversed, the second issue regarding whether the Office properly refused to reconsider appellant's claim on May 12, 2003 is moot and will not be addressed.

CONCLUSION

The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits effective June 3, 2002, on the grounds that she refused suitable employment.

ORDER

IT IS HEREBY ORDERED THAT the May 12 and February 19, 2003 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: February 23, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member