United States Department of Labor
Employees' Compensation Appeals Board

LAURIE MURRELL, Appellant	)	
and	)	**Docket No. 04-153**
	)	**Issued: June 14, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Scottsbluff, NE, Employer	)	

Appearances
Kathi Gale Hanby, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On October 28, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated April 18, 2003 finding that appellant 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 effective January 13, 1999 on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On April 21, 1996 appellant, then a 34-year-old distribution clerk, filed an occupational claim alleging that the duties of her federal employment caused pain in her right shoulder and arm. She did not immediately stop working. Instead appellant worked light duty until October 7, 1996 when she stopped work until returning to restricted duty on March 13, 1997.

Her restrictions included working four hours a day, sitting and with no repetitive activities or lifting over 10 pounds. In a June 17, 1996 report, Dr. Kent Smith, an osteopath, stated that appellant presented with pain in her right shoulder and a popping sensation that occurred when she reached with her right arm. Appellant complained of numbness and pain that began in her deltoid muscle and radiated down her right arm. He noted that appellant improved when she went to light duty, but frequent sorting caused her to relapse and the pattern repeated itself several times. Dr. Smith diagnosed right shoulder strain, which he attributed to sorting activities at work. In a December 31, 1996 decision, the Office accepted the claim for right shoulder tendinitis.

In an April 14, 1997 report, Dr. Smith reviewed a description of light-duty work sent to him by the employing establishment and indicated what work appellant could perform. He listed appellant's work restrictions as no repetitive pushing, pulling or lifting and she should avoid distributing, withdrawing, sorting mail and serving as a temporary letter carrier. In a February 27, 1998 letter, the employing establishment offered appellant a job as a modified PTF distribution clerk that contained a list of clerical duties, including distributing mail and a statement that the job offer was within appellant's medical restrictions of intermittent lifting up to 25 pounds, no repetitive lifting over 10 pounds, no reaching above her shoulders. In a March 13, 1998 letter, appellant stated that the position was outside her medical restrictions.

In an April 4, 1998 letter, the Office referred appellant for a second opinion and a functional capacity evaluation (FCE). In a May 19, 1998 FCE, appellant was able to lift occasionally, 55 pounds from the floor to her waist, 40 pounds from her waist to her shoulders and 20 pounds above her shoulders. She could push a cart weighing 250 pounds 200 feet and sort mail for 30 minutes. Appellant completed repetitive reaches to her side and tossed mail packages for 30 minutes. The report recommended that overhead reaching be limited to an occasional basis and forward reaching to a frequent basis with short rest breaks every hour.

In a May 19, 1998 report, Dr. Eric Stahl, an orthopedist and Office referral physician, wrote that appellant had limited motion in her right shoulder, but was not in need of surgery. He recommended that she follow the restrictions outlined in the FCE, attend physical therapy and see a physiatrist. Dr. Stahl did not respond to repeated attempts for a narrative report and appellant was referred for another second opinion.

In an August 25, 1998 report, Dr. Michael Myers, an internist and Office referral physician, wrote that appellant presented with complaints of pain in the right to mid back rhomboid area and trapezius area after minimal sorting and tossing activity, though she showed a full range of motion. He noted that palpation of the right shoulder and back did not reproduce the pain. Dr. Myers compared appellant's FCE results to the offered job description and stated that, while appellant cannot perform the offered job, she could do all the tasks except lifting over 55 pounds, pushing over 250 pounds and repetitive overhead and forward reaching. On September 14, 1998 Dr. Myers visited appellant's work site, reviewed her workstation and suggested various modifications. He stated that appellant could sort mail up to 30 minutes with occasional overhead lifting, sort and toss parcels up to 20 pounds and prepare mail trays. Dr. Meyers also opined that with his modifications appellant could perform the PTF distribution clerk position offered by the employing establishment.

In a September 24, 1998 report, Dr. Scott Bainbridge, an orthopedist and Office referral physician, wrote that appellant presented with pain in her right upper trapezius and right medial scapula with occasional radiation to the upper right chest. He could find no evidence of tendinitis in her right shoulder and opined that her right arm pain complaints were consistent with myofascial pain. Dr. Bainbridge stated that appellant could perform the limited-duty job offer.

On September 29, 1998 the employing establishment offered appellant a limited-duty position as a PTF distribution clerk position. The position included preparing, distributing and clearing mail and sorting mail and parcels up to 30 minutes a day. In response to an October 1, 1998 letter from the Office, Dr. Bainbridge checked "yes" that appellant's myofascial pain syndrome was causally related to her work and stated that his restrictions were temporary and given to prevent an aggravation or recurrence of her symptoms while working.

In an October 1, 1998 report, Dr. Robin Ockey, a physiatrist, stated that appellant presented with bilateral shoulder pain, more severe on the right. He stated that appellant described intermittent pain, that was severe some days and not present on other days. On examination he found her shoulders stable with no sign of impingement syndrome. Dr. Ockey noted trigger points in the right pectoral muscle as well as the right lower rhomboid region and less pronounced in the trapezius musculature and her cervical range was full with no discomfort. He reported that Phalen's, Tinel's and carpal tunnel compression tests were all positive on the right side. Tinel's was also positive on the left. Dr. Ockey stated that, after a review of the medical record and examination of appellant, he believed that a majority of her symptoms were caused by myofascial pain involving her rhomoids and possibly trapezius musculature on her right side. He stated that appellant should return to physical therapy and that her current work conditioning program exacerbated her symptoms. Dr. Ockey recommended that while appellant was in her rehabilitation program that she not sort, lift or throw mail. In an October 12, 1998 letter, appellant refused the job offer; writing that it was premature as her restrictions had changed as a result of her ongoing therapy and that she could not perform all the job functions.

On October 21, 1998 the Office notified appellant that it found the job offer suitable and that she had 30 days to accept the job or provide reasons why she refused it. In an undated note, appellant stated that she could not accept the job offer because she was still in therapy and her doctor recommended another functional capacity evaluation. In a November 20, 1998 letter, the Office informed appellant that her reasons for refusing the job were insufficient and she had 15 days to report to work.

In a November 11, 1998 report, Dr. Ockey stated that appellant had some residual impairment and that another FCE was necessary as the previous one, and Dr. Myers' work site assessment, were outdated. Another FCE was performed on December 15, 1998. The results showed that appellant should not lift more than 10 pounds repetitively, not sort mail for more than 6-minute durations with her right hand and no pushing a cart weighing more than 300 pounds. Appellant was not to write continuously for more than 30 minutes or carry flats over 4 pounds. The report concluded that appellant could perform the light-duty job offered with the above restrictions. In a January 5, 1999 form report, Dr. Ockey stated that appellant was significantly better since he last saw her. Her job restrictions included no reaching forward or

above her shoulder for more than 30 minutes, no pushing more than 30 pounds, no lifting greater than 38 pounds and no writing for more than 30 consecutive minutes. In a January 13, 1999 decision, the Office terminated appellant's compensation finding the job offer fit for Dr. Ockey's restrictions and that she had refused an offer of suitable work.

Appellant requested reconsideration and submitted a March 3, 1999 report from Dr. Ockey who wrote that appellant had chronic pain involving the parascapular musculature that appeared to be myofascial in nature and very mild carpal tunnel syndrome, bilaterally. He offered no work restrictions noting that appellant was no longer employed.

In a July 18, 2000 letter, appellant requested reconsideration but submitted no new medical evidence. She argued that Dr. Myers' was biased and that Dr. Ockey had advised her to refuse the job. In an October 17, 2000 decision, the Office denied modification finding the job offer suitable and noting that the employing establishment offered appellant ergonomic chairs and other modifications but she still refused.

In an October 14, 2001 letter, appellant, through her representative, requested reconsideration and argued that the job offered was not suitable as it was vague on the physical requirements and was not approved by a doctor. Appellant noted that the job offer was dated September 29, 1998 two days prior to appellant's October 1, 1998 FCE. Appellant also argued that her claim should be expanded to include myofascial pain syndrome. In an April 18, 2003 decision, the Office denied modification finding the job offered was consistent with appellant's medical restrictions, including the results and recommendations of the December 15, 1998 FCE. The decision also stated that the issue was the refusal of suitable work, not the scope of the accepted conditions.[1]

LEGAL PRECEDENT

Section 8106(c)(2) 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] However, to justify such termination, the Office must show that the work offered was suitable.[3] An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[4]

[1] The Board notes the record also contains Office decisions dated October 28, 2002 and July 22, 2003. These decisions are not addressed in this decision as they are not related to the suitable work termination and appellant specifically identified the April 18, 2003 decision in her appeal to the Board.

[2] 5 U.S.C. § 8106(c)(2).

[3] *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

[4] 20 C.F.R. § 10.124; *see Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

Section 2.814.4a(1) of the Office procedure manual states:

> Any such [job] offer must be in writing and must include the following information:
>
> (a) A description of the duties to be performed.
>
> (b) The specific physical requirements of the position and any special demands of the workload or unusual location of the job.

Section 8123(a) of the Act provides in pertinent part: "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."[5] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[6]

ANALYSIS

The Board finds that the Office improperly terminated appellant's compensation for refusing an offer of suitable work. In the present case, the employing establishment's job offer was dated September 29, 1998. The requirements of the offered job included preparing, distributing and clearing accountable mail and noted that these duties may be rotated to accommodate appellant's medical restrictions including 30 minutes per day of mail and parcel sorting. On October 12, 1998 appellant refused the job relying on the October 1, 1998 medical report from Dr. Ockey who stated that appellant's work hardening program had exacerbated her condition. He referred appellant to physical therapy and stated that, while in her rehabilitation program, appellant should not sort, lift or throw mail. As the job offered to appellant included the job requirement of sorting mail, which her most recent medical report indicated she could not perform, appellant was justified in refusing the job offer based on the medical evidence at that time.

Moreover, in terminating appellant's compensation the Office relied on the restrictions Dr. Ockey provided in his October 1, 1998 report. But the job offer, and the Office's subsequent determination that it was suitable, preceded the medical evidence relied upon to terminate appellant's compensation. This is improper because the determination that the job is suitable must be made by the Office prior to offering the job to appellant.

The Board further finds that the Office did not comply with its own procedures. The Office procedure manual at section 28.14.4a(1) states that the job offer must include a description of the duties to be performed and the specific physical requirements of the position. It appears, though it is not clear from the job offer, that appellant is expected to sort and toss

[5] 5 U.S.C. § 8123(a).

[6] *William C. Bush*, 40 ECAB 1064, 1975 (1989).

mail. The September 29, 1998 job offer states she is to "prepare and distribute" mail and notes that appellant may rotate these duties to accommodate her medical restrictions of sorting mail and parcels. As the offered job is vague, fails to specifically state what appellant's duties are and what the physical requirements are expected of her, the Office has not met its burden of proof to terminate appellant for refusing an offer of suitable work.

CONCLUSION

The Office did not meet its burden of proof to establish that appellant refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the April 3, 2003 decision by the Office of Workers' Compensation Programs is reversed.

Issued: June 14, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member