United States Department of Labor
Employees' Compensation Appeals Board

BONNIE L. CLORE, Appellant	)	
and	)	**Docket No. 05-258**
	)	**Issued: October 6, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Duluth, GA, Employer	)	

Appearances:
L. Prentice Eager, III, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 8, 2004 appellant filed a timely appeal of a merit decision of the Office of Workers' Compensation Programs dated August 12, 2004 which denied modification of the October 5, 2003 termination of her compensation benefits for refusal of suitable work and a December 5, 2003 decision which denied her request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's monetary compensation benefits effective October 8, 2003 on the grounds that she refused an offer of suitable work; and (2) whether the Office properly denied appellant's request for an oral hearing.

FACTUAL HISTORY

On March 20, 1999 appellant, then a 56-year-old part-time temporary relief mail carrier, filed a traumatic injury claim alleging that on February 16, 1999 she sustained a left knee injury as she was descending a steep driveway on her postal route. Appellant stopped working on

April 17, 1999. The Office accepted that she sustained a torn anterior cruciate ligament in her left knee and approved surgery for ligament repair. She was placed on the periodic rolls for receipt of compensation effective December 10, 1999.

As of April 20, 1999 appellant began working for Lowe's Building Supply approximately 30 hours per week. On April 25, 1999 she provided a letter voluntarily resigning from the employing establishment effective April 17, 1999 for reasons unrelated to her on-the-job injury. Beginning August 20, 1999 appellant worked for Allen Electric. However, she subsequently stopped work because it involved crawling into small spaces. In June 2000, she started working at Aaron Hornsby Flower Shop for approximately 20 hours per week.

On November 30, 1999 Dr. John I. Foster, III, an attending Board-certified orthopedic surgeon, performed a left knee arthroscopy with partial lateral meniscectomy.

On October 31, 2000 the employing establishment noted that appellant had resigned effective October 1, 1999 and that, although she had been released to return to limited duty, it was unable to rehire her. On March 2, 2001 the Office recommended vocational rehabilitation. On March 16, 2001 Dr. Foster recommended that appellant work 20 hours per week. In a form report dated May 9, 2001, Dr. Foster diagnosed degenerative joint disease of the left knee and indicated that appellant could return to alternative duty effective that date.

On August 15, 2001 Dr. Foster completed a work capacity evaluation form, finding that appellant could return to full-duty, eight hours per day. However, on September 19, 2001 he again noted that she could work for only four hours per day with physical restrictions, such as no commercial truck driving and no working over 20 hours per week.

On November 7, 2001 the employing establishment noted that, when Dr. Foster released appellant to eight hours per day limited duty, it could provide a full-time limited-duty job. On November 30, 2001 he completed another form report releasing her to alternative duty effective that date. Dr. Foster opined that appellant had permanent restrictions on commercial truck driving and working more than 20 hours per week and that she would need a total knee replacement.

On February 8, 2002 the Office referred appellant for a second opinion evaluation. In a report dated March 1, 2002, Dr. Joseph I. Hoffman, Jr., a Board-certified orthopedic surgeon, noted that following surgery she experienced left knee pain that was aggravated by prolonged standing, driving or lifting. He noted that appellant was never able to resume her full-time work as a mail carrier and was limited to 20 hours per week with no commercial driving. She was presently wearing a left knee brace while working. Dr. Hoffman reported finding on physical examination, reviewed her diagnostic radiology reports and diagnosed degenerative joint disease of the left knee, moderately severe and a partial tear of the anterior cruciate ligament. Dr. Hoffman opined that appellant's degenerative joint disease and chondromalacia were chronic and were aggravated by the February 16, 1999 employment injury. He stated that she had reached maximum medical improvement and would eventually need a total knee replacement. Dr. Hoffman found that appellant could work eight hours per day at a sedentary job with physical restrictions. He completed an OWCP-5 work capacity evaluation, noting that appellant had a lifting limit of 10 pounds for no more than 2 hours per day, a pushing and pulling limit of

15 pounds for no more than 4 hours per day and a 4-hour limit on walking and standing and twisting.

On April 29, 2002 the Office determined that there was a conflict in medical opinion evidence between Dr. Foster and Dr. Hoffman and it referred appellant, together with a statement of accepted facts, questions to be addressed and the case record, to Dr. Thomas J. Chambers, a Board-certified orthopedic surgeon, for an impartial medical examination.

On May 28, 2002 Dr. Chambers provided reports on appellant's left knee condition. He reviewed the other clinical reports of record and indicated that she still experienced left knee pain and instability. Dr. Chambers found that appellant could work an eight-hour day, without squatting, carrying or stair climbing but noted that she had pain if she stood or sat for too long, with swelling and giving way of the knee. He reported the results of his physical examination of her, noting that appellant had marked medial tenderness about the lateral joint line, trace effusion, minimal synovitis, a positive Lachman's maneuver, trace valgus laxity, mild patellofemoral grinding and some atrophy of the left lower extremity. He diagnosed severe left knee degenerative joint disease and chronic anterior cruciate ligament laxity. In a work capacity evaluation, Dr. Chambers noted that appellant was restricted to walking and standing for no more than one hour per day, with no pushing, pulling, squatting, kneeling or climbing and limited to four hours of lifting.[1] He indicated that she would need five minute breaks about every hour and would be a candidate of a total knee replacement. Dr. Chambers reiterated that appellant could work 8 hours per day, 40 hours per week, as long as her job was sedentary with no carrying, no squatting, no stair climbing and without climbing in and out of trucks. He also noted that she had recently moved to Longs, South Carolina from Norcross, Georgia.

By letter dated June 26, 2002, the Office advised appellant of a limited-duty assignment at her former employing establishment in Duluth, Georgia, with a description of the modified duties as a temporary relief carrier. The offered position was for 5.25 hours per day for 6 days per week, for a total of 31.50 hours per week. Appellant's wages would be equivalent to those at the time of injury. The Office indicated that, once notified of her acceptance of the position, it would provide relocation expenses. If she believed that she was unable to perform the limited duties for medical reasons, appellant was requested to submit medical evidence to this effect by her treating physician no later than July 27, 2002. The Office notified her of the provisions of 5 U.S.C. § 8106(c).

On July 1, 2002 appellant was scheduled for a left total knee replacement with Dr. Chambers. On July 3, 2002 she requested a change in physicians from Dr. Foster to Dr. Chambers, based on her move to South Carolina. She also advised the Office that she was declining the offered position because her left knee condition had deteriorated. On July 3, 2002 in a note to the human resources specialist, appellant explained that she was declining the job offer at that time because Dr. Chamber's office had begun the process for knee replacement surgery, which would take place in South Carolina.

On August 20, 2002 appellant advised the Office that she broke a tooth which required an emergency root canal work and that her knee surgery was not recommended until a permanent

[1] Appellant began treatment with Dr. Chambers on May 28, 2002.

crown was in place. She was rescheduled for total knee joint replacement surgery on October 21, 2002. On that date appellant underwent joint replacement surgery and remained disabled through November 23, 2002.

By report dated January 8, 2003, Dr. Chambers discussed appellant's left knee status following surgery. She had a left total knee replacement in October and was beginning to recover, but developed pain after physical therapy. Dr. Chambers stated that appellant experienced residuals of a stiff and painful left knee.

In a letter dated January 27, 2003, the Office sent Dr. Chambers a copy of appellant's date-of-injury job description and asked if she was capable of performing the position at that time or after physical therapy. The Office requested that he complete another work tolerance report as to her physical limitations.

In an April 24, 2003 work capacity evaluation, Dr. Chambers noted that appellant could not return to her regular job, as she was precluded from lifting. He noted, however, that she could work 8 hours a day subject to 4 hours a day of walking and standing, 3 hours a day of pushing and pulling 25 to 30 pounds, rarely squatting 0 to 1 hour a day, occasionally kneeling and occasional climbing 1 to 2 hours a day. Dr. Chambers indicated that appellant would need a break every two hours.

By letter dated July 14, 2003, the Office advised appellant that the modified-duty position of temporary relief carrier was still available for her in Georgia. She was again advised of the provisions of section 8106(c)(2) and provided 30 days to accept or reject the position. In a response dated August 10, 2003, appellant noted that she had obtained employment as a photographer and declined the offered position as it was in Georgia.

On August 20, 2003 the Office advised appellant that her reasons for refusing the offered position were unacceptable. She was provided 15 days to accept the position or it would proceed with a final decision. On September 1, 2003 appellant responded, again declining the job offer in Duluth, Georgia, as it was located 400 miles from where she lived.

By decision dated September 10, 2003, the Office found that appellant had refused an offer of suitable work and, effective October 5, 2003, terminated her wage-loss benefits. Appellant was advised of her continuing entitlement to medical benefits.

On October 29, 2003 appellant requested a hearing before an Office hearing representative. On December 5, 2003 the Branch of Hearings and Review denied her request as it was not timely filed.

On May 27, 2004 appellant requested reconsideration and submitted additional evidence, including materials already of record and previously considered.

By decision dated August 12, 2004, the Office denied modification of the September 10, 2003 decision. The Office found that appellant had moved away from a suitable job and had submitted insufficient evidence to support her reasons for refusal.

LEGAL PRECEDENT

Section 8106 (c)(2) of the Federal Employees' Compensation Act[2] provides that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for her, is not entitled to compensation.[3] The Office has authority under this section to terminate compensation for any partially disabled employee, who refuses or neglects suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.[4] As section 8106(c) is a penalty provision, the Office has the burden of showing that the work offered to and refused by a claimant was, in fact, suitable.[5]

If possible, the employer should offer suitable reemployment in a location where the employee currently resides. If this is not practical, the employer may offer suitable reemployment at the employee's former duty station or other location.[6]

ANALYSIS

The employing establishment offered appellant a modified-duty position in Duluth, Georgia, the area in which she worked at the time of her employment injury. The record establishes, however, that she relocated in 2002, to Longs, South Carolina, approximately 400 miles from the employing establishment. The record does not indicate that any effort was made to determine if reemployment was possible in South Carolina, an aspect of the case that should have been developed prior to finding that the offered position was suitable.

The Office's federal regulations provide that, when an employee would need to move to accept an offer of employment, the employing establishment should, if possible, offer suitable work in the location where the employee currently resides. The record contains no evidence that the employing establishment determined whether reemployment was possible in South Carolina. In 1987, the pertinent regulation applied only to former employees, who were terminated from the agency's employing establishment rolls:

> "Where an injured employee relocates after having been terminated from the [employing establishment's] rolls, the Office encourages employing agencies to offer suitable reemployment in the location where the former employee currently

[2] 5 U.S.C. § 8106(c)(2).

[3] 5 U.S.C. § 8106(c)(2).

[4] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

[5] *Glen L. Sinclair*, 36 ECAB 664 (1985).

[6] 20 C.F.R. § 10.508 (1999); *see also Sharon L. Dean*, 56 ECAB ___ (Docket No. 04-1707, issued December 9, 2004).

> resides. If this is not practical, the employing establishment may offer suitable employment at the employee's former duty station or other alternate location"

The regulation in effect since 1999 contains no such restrictive language.[7] The regulation now states that the employer "should" offer suitable reemployment where the employee currently resides, if possible. The Office should have developed the issue of whether suitable reemployment in or around Longs, South Carolina, was possible. It was reversible error for the Office to terminate appellant's compensation benefits without evidence showing that such a job offer was not possible or practical.[8]

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits based on her refusal of a suitable job offer.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 12, 2004 is reversed.[9]

Issued: October 6, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[7] *See* 20 C.F.R. § 10.508 (1999) and accompanying language.

[8] *See Sharon L. Dean*, *supra* note 6.

[9] Reversal of the Office's decision to terminate compensation benefits renders moot the December 5, 2003 decision by the Office's Branch of Hearings Review denying appellant's request for an oral hearing before an Office hearing representative as untimely.