United States Department of Labor
Employees' Compensation Appeals Board

RHODA DYE, Appellant	)	
and	)	**Docket No. 05-439**
	)	**Issued: September 15, 2005**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Denver, CO, Employer	)	

Appearances:
John S. Evangelisti, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge

JURISDICTION

On December 9, 2004 appellant filed a timely appeal from an October 6, 2004 merit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On July 19, 1989 appellant, then a 49-year-old food service worker, filed a traumatic injury claim alleging that she sustained a back and hip injury when lifting the cover of a trash compacter. The Office accepted the claim for low back strain and expanded this to include sciatica. Appellant stopped work on July 19, 1989 and returned to regular duty on October 30, 1989.

Appellant came under the care of Dr. James G. Urban, a Board-certified orthopedist, who noted treating appellant since August 1989. In reports dated August 3, 1989 to January 20, 1990, he noted a history of appellant's work-related injury and diagnosed low back strain. On December 5, 1989 appellant filed a Form CA-2a, notice of recurrence of disability, alleging that she experienced a recurrence of symptoms on November 4, 1989. Appellant stopped work on November 5, 1989 and returned on November 27, 1989[1] subject to various restrictions and on January 8, 1990 she stopped work due to low back pain and tenderness.

Thereafter, in the course of developing the claim, the Office referred appellant to several second opinion physicians and also to impartial medical examiners.[2]

Appellant came under the care of Dr. Pamela A. Knight, a Board-certified orthopedic surgeon, who noted treating appellant since November 2000 for her work-related low back injury. In reports dated November 15 to December 29, 2000, she diagnosed L5-S1 Grade 2 spondylolisthesis with minimal instability, probable S1 nerve root irritation and radiculopathy. On December 29, 2000 the physician noted that appellant underwent epidural steroid injections to relieve her low back pain. In reports dated February 12 and November 14, 2001, Dr. Knight advised that a magnetic resonance imaging (MRI) scan did not reveal evidence of a disc protrusion and noted that appellant was not experiencing pain and was doing very well. On June 17 to December 17, 2002 she indicated that appellant had severe left lower extremity sciatica-type symptoms radiating from her buttock to her calf and foot. Appellant underwent lumbar epidural steroid injections on July 5, 12 and 19, 2002. Dr. Knight, in reports dated August 16 to December 17, 2002, diagnosed left S1 radiculopathy secondary to L5-S1 spondylolisthesis, with instability, causally related to the prior work injury. Dr. Knight released appellant to work four hours daily within certain restrictions and noted that her hours would be increased to six hours per day and then eight hours per day in the next two months. In a work-capacity evaluation dated August 12, 2003, she diagnosed S1 radiculopathy and Grade 3 spondylolisthesis. She advised that appellant could work 4 hours per day with intermittent 15-minute breaks, sitting for 4 hours per day with 15-minute breaks, walking and standing limited to 2 hours with breaks, twisting, pushing limited to 1 hour and limited to 10 pounds, pulling and lifting limited to one-half hour and 10 pounds. Finally, in reports dated October 24 to November 21, 2003, the physician noted performing three epidural steroid injections with 60 percent relief of appellant's symptoms.

On September 26, 2002 the Office referred appellant for vocational rehabilitation. In a closing report dated June 11, 2003, the counselor noted that she would continue labor market

[1] The record reflects that the Office did not issue a final decision with regard to the recurrence of disability.

[2] On June 19, 1998 the Office issued a notice proposing to terminate appellant's compensation benefits on the grounds that she had no residuals of her work-related injury. The Office made this decision final on July 29, 1998. In a decision dated September 29, 1998, the Office vacated the decision dated July 29, 1998 and determined that a conflict of opinion had been established between the second opinion physician, Dr. Stephen D. Lindenbaum, a Board-certified orthopedist, who opined that appellant had no disabling residuals and could work eight hours with restrictions and Dr. Urban, appellant's treating physician, who opined that appellant had residuals of her work injury and could not work. In a report dated November 3, 1998, the referee physician, Dr. David E. Stabel, a Board-certified orthopedist, noted that appellant had residuals of her work-related injury and was not able to be gainfully employed. Thereafter, the Office accepted that appellant developed sciatica causally related to her work injury.

research and contact appellant's previous employer in an attempt to find appropriate employment. She noted that based on the results of vocational testing the probability of success was fair. The counselor suggested a return to work in an area related to appellant's background in a part-time position where she would gradually increase her hours.

On May 19, 2004 the employing establishment offered appellant a part-time position four hours per day as a food service worker. The position was subject to the restrictions set forth by Dr. Knight on August 12, 2003.

On May 26, 2004 the Office referred appellant to an Office referral physician, Dr. John D. Douthit, a Board-certified orthopedic surgeon.

By letter dated May 29, 2004, appellant declined the job offer and advised that the job offer did not specifically reflect Dr. Knight's work restrictions.

By letter dated June 1, 2004, the Office informed appellant that it had reviewed the position description and found that the job offer suitable with her physical limitations. Appellant was advised that she had 30 days to accept the position or offer her reasons for refusing. She was apprised of the penalty provision of the Federal Employees' Compensation Act[3] if she did not return to suitable work.

In a medical report dated June 9, 2004, Dr. Douthit stated that he reviewed the records provided to him and performed a physical examination of appellant. He diagnosed spondylolisthesis with radiculopathy and sciatica. He noted current objective findings of restricted range of motion and pain on flexion. He advised that appellant was not able to work her date-of-injury job but she would be able to work four hours per day with provisions for a change in posture. In a work capacity evaluation of the same date, Dr. Douthit diagnosed chronic back and leg pain and noted that the following permanent restrictions apply based on appellant's accepted conditions: appellant could work 4 hours per day, sitting was limited to 4 hours per day with a posture change, walking was limited to 1 hour per day, no standing, pushing, pulling and lifting was limited to 4 hours per day and 10 pounds.

In a letter dated June 28, 2004 appellant, through her attorney, again declined the job offer and advised that the job offer did not attach a position description including job restrictions. Appellant also submitted a report from Dr. Knight dated May 28, 2004, who advised that appellant presented with significant pain and discomfort. She recommended an MRI scan.

By letter dated July 6, 2004, the Office requested a supplemental report from Dr. Douthit and requested that he address whether the condition of spondylolisthesis was work related. In a report dated July 19, 2004, Dr. Douthit advised that appellant had a preexisting diagnosis of spondylolisthesis but her current condition was due to an aggravation of the spondylolisthesis, which was causally related to the work injury.

By letter dated July 7, 2004, the Office advised appellant that they reviewed appellant's reason for refusal of the offered position and the refusal not justified. The Office advised

[3] 5 U.S.C. §§ 8108-8193.

appellant that the modified position was suitable work and she would be given an additional 15 days to accept the job offer without penalty.

On July 29, 2004 the employing establishment provided an addendum to the job offer and noted that position was in compliance with the restrictions set forth by Dr. Knight on August 12, 2003. The job offer noted that the position was permanent and provided that appellant could work 4 to 8 hours per day progressive for work hardening and sitting was limited to 4 hours with 15-minute breaks, walking and standing limited to 2 hours with breaks, bending limited to 4 hours intermittently, no squatting, climbing limited to 1 hour intermittently, no kneeling, no twisting, no operating foot controls, lifting and pulling were limited to 10 pounds for 30 minutes per day, pushing limited to 1 hour and 10 pounds and reaching was limited to 4 hours per day.

In a letter dated July 29, 2004, the Office advised appellant that the job offer constituted suitable work. Appellant was informed that she had 30 days to either accept the position or provide an explanation of the reasons for refusing it; otherwise, she risked termination of her compensation.

In a letter dated August 26, 2004, appellant refused the job offer noting that the job offer did not provide a position description. Appellant noted that the physical requirements of the job exceed the restrictions set forth by the second opinion physician on June 9, 2004.

By letter dated September 7, 2004, the Office advised appellant that it reviewed appellant's reason for refusing the offered position and found the refusal was not justified. The Office advised appellant that the modified position was suitable work and she would be given an additional 15 days to accept the job offer without penalty.

By letter dated September 17, 2004, appellant declined the position and noted that she could not perform the job without endangering her health. Appellant submitted reports dated July 19 and August 20, 2004 from Dr. Knight, who diagnosed spondylolisthesis and sciatica and noted that her prior work restrictions were still in effect. She further noted that appellant fractured her right hip when she fell at home in June 2004.

By decision dated October 6, 2004, the Office terminated appellant's compensation, effective October 2, 2004, finding that she refused an offer of suitable work.

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees' Compensation Act states 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 him is not entitled to compensation.[4] 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

[4] 5 U.S.C. § 8106(c)(2).

of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.[5] In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.[6]

The implementing regulation provides 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.[7] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[8]

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.[9] In assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[10]

ANALYSIS

The Office accepted that appellant sustained a low back strain and sciatica. The Office terminated appellant's compensation effective October 2, 2004 based on appellant's refusal of suitable work. The Board finds that the Office established that the offered position of July 29, 2004 was suitable.

The record reflects that the physical restrictions of the modified position offered to appellant on July 29, 2004 conformed within the limitations provided by appellant's treating physician, Dr. Knight. In a work capacity evaluation dated August 12, 2003, Dr. Knight advised that appellant could work 4 hours per day with intermittent 15-minute breaks, sitting for 4 hours per day with 15-minute breaks, walking and standing limited to 2 hours with breaks, twisting, pushing limited to 1 hour and limited to 10 pounds, pulling and lifting limited to one-half hour and 10 pounds. The job specifically indicated that appellant would work in food service for four to eight hours per day progressive for work hardening. The offer advised that sitting was limited

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

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

[7] 20 C.F.R. § 10.517(a) (1999).

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

[9] *See Marilyn D. Polk*, 44 ECAB 673 (1993).

[10] *See Connie Johns*, 44 ECAB 560 (1993).

to 4 hours with 15-minute breaks, walking and standing limited to 2 hours with breaks, bending limited to 4 hours intermittently, no squatting, climbing limited to 1 hour intermittently, no kneeling, no twisting, no operating foot controls, lifting and pulling were limited to 10 pounds for 30 minutes per day, pushing limited to 1 hour and 10 pounds and reaching was limited to 4 hours per day. The Board finds that Dr. Knight's opinion with respect to appellant's work limitations is based on a proper factual background and is sufficient to establish that the position is medically suitable to her work restrictions.

The Board notes that appellant was referred to Dr. Douthit, an Office referral physician, for a determination as to whether appellant had any current residuals of her work-related condition. He was not asked to address the suitability of the job offer. The Board notes that, although the job offer specifically conformed to Dr. Knight's restrictions, these restrictions were substantially similar to that of Dr. Douthit as both physicians opined that appellant could work 4 hours per day and sitting was limited to 4 hours per day with 15-minute breaks. The Board notes that Dr. Knight, as appellant's treating physician, had complete knowledge of the relevant facts and had numerous opportunities to examine appellant and to evaluate the course of her condition. Dr. Knight clearly opined that appellant could return to work subject to the restrictions set forth in her work capacity evaluation of August 12, 2003. Her opinion therefore must be considered reliable. The Board finds that Dr. Knight's opinion is probative on the issue of appellant's ability to work.[11]

The Board further finds that the Office complied with its procedural requirements in advising appellant that the position was found suitable and providing her with the opportunity to accept the position or provide her reasons for refusing.[12] The record reflects that appellant responded to the Office's notice in a letter dated August 26, 2004 and indicated that the offer did not provide a job description and did not consider the Dr. Douthit, the second opinion physician's restrictions. As noted above, the job offer specifically conformed to the treating physician's restrictions and, as appellant's treating physician, Dr. Knight opined that appellant could return to work subject to the restrictions set forth in her work capacity evaluation of August 12, 2003. Thereafter, the Office properly notified appellant that the issue of suitability was primarily a medical issue and that her reasons for rejecting the offer were unacceptable. The Office advised that appellant had 15 additional days from September 7, 2004 to accept the offer and if she did not, a final decision under 5 U.S.C. § 8106(c)(2) would be made. Appellant again rejected the offer but submitted no medical evidence specifically addressing the suitability of the offered food service worker. Therefore, appellant did not submit any evidence or argument to show that the offered position was not medically suitable.[13] Thus, under section 8106 of the Act, her compensation was properly terminated.

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

[11] *See generally Melvina Jackson*, 38 ECAB 443, 450 (1987) (discussing the factors that bear on the probative value of medical opinions).

[12] *See Bruce Sanborn*, 49 ECAB 176 (1997).

[13] *See Les Rich*, 54 ECAB ___ (Docket No. 01-1995, issued January 2, 2003).

the medical evidence.[14] In this case, the medical evidence provided from Dr. Knight, appellant's attending physician, establishes the suitability of the offered position. The Office met its burden of proof to terminate appellant's compensation based on her refusal of suitable work.[15]

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation pursuant to 5 U.S.C. § 8106(c)(2) for refusing or neglecting suitable work.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs decision dated October 6, 2004 is affirmed.

Issued: September 15, 2005
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

[14] *See Maurissa Mack*, 50 ECAB 498 (1999); *Robert Dickerson*, 46 ECAB 1002 (1995).

[15] *See Deborah Hancock*, 49 ECAB 606 (1998); *Henry P. Gilmore*, 46 ECAB 709 (1995).