United States Department of Labor
Employees' Compensation Appeals Board

RUTH L. BARKLEY, Appellant	)	
and	)	**Docket No. 04-1893**
	)	**Issued: January 4, 2006**
U.S. POSTAL SERVICE, POST OFFICE, San Diego, CA, Employer	)	

Appearances:
Tom Donahue, 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 July 21, 2004 appellant, through her representative, filed a timely appeal from October 10, 2003 and February 14, 2004 merit decisions of the Office of Workers' Compensation Programs, denying modification of its termination of her compensation on the grounds that she refused an offer of suitable work. She also appealed from a June 18, 2004 nonmerit decision denying her request for reconsideration under 5 U.S.C. § 8128. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits and over the June 18, 2004 nonmerit decision.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation benefits under 5 U.S.C. § 8106, on the grounds that she refused an offer of suitable work; and (2) whether the Office properly denied merit review of appellant's claim under section 8128.

FACTUAL HISTORY

This case is before the Board for the second time. In the first appeal, the Board reversed the Office's September 13, 1995 wage-earning capacity determination.[1] The Board found that the Office improperly determined that appellant had the capacity to earn wages as a telephone solicitor.

By letter dated September 14, 2000, the Office noted that appellant had not submitted medical evidence since 1994 and requested a comprehensive report from her attending physician.

In a report dated October 20, 2000, Dr. Frederick W. Close, a Board-certified orthopedic surgeon, diagnosed cervical strain, adhesive capsulitis of the right shoulder and a herniated disc at L5-S1 on the left with radiculopathy into the left lower extremity. He opined that appellant was totally disabled from employment and provided work restrictions.

Based on the work restrictions of Dr. Close, the employing establishment offered appellant a position as a video coding system technician. The Office reviewed the position and determined that the medical evidence was not sufficient to establish that she could perform the duties of the position. Consequently, on March 27, 2002 the Office referred her to Dr. Thomas R. Dorsey, a Board-certified orthopedic surgeon, for a second opinion examination. The Office did not inform appellant's representative, Tom Donohue, of the referral.[2]

In a report dated April 11, 2002, Dr. Dorsey found that appellant no longer had objective findings of her accepted condition of lumbar sprain/strain and "no evidence of any inability to work related to the events of August 14, 1974." He noted that she had numerous other nonemployment-related conditions and stated, "With regard to the other conditions and the nonorthopedic conditions and their impact on work, this would be best left to evaluation by the appropriate specialist, which would be an internal medicine physician."

By letter dated June 14, 2002, the Office informed appellant that the position of video coding system technician was suitable and that section 8106(c), of the Federal Employees' Compensation Act[3] provided that an employee who refused an offer of suitable work was not entitled to further compensation. The Office afforded appellant 30 days to accept the offer or provide reasons for her refusal. The Office did not send a copy of the letter to Mr. Donohue.

In a response received by the Office on June 28, 2002, appellant described her physical problems and noted that she could not see to drive because she had trouble with the vision in her right eye due to her diabetes.

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[1] *Ruth L. Barkley*, Docket No. 96-117 (issued March 5, 1998).

[2] The letter authorizing appellant's representation by Mr. Donohue is not contained in the case record. The Office, however, sent Mr. Donohue a copy of its letter placing appellant on the periodic rolls on April 7, 1998 and a copy of its September 13, 1995 wage-earning capacity decision. The record further contains no letter withdrawing Mr. Donohue as the authorized representative.

[3] 5 U.S.C. §§ 8101-8193.

On June 19, 2002 the Office verified that the position remained available and issued a letter to appellant and Mr. Donohue notifying them that her reasons for refusing the position were unacceptable and informing her that she had 15 days to accept the offered position. The Office noted that no further arguments would be considered.

By decision dated August 7, 2002, the Office terminated appellant's compensation on the grounds that she refused an offer of suitable work pursuant to section 8106.

On August 10, 2002 appellant requested an oral hearing before an Office hearing representative.

In a report of telephone call dated August 21, 2002, a claims examiner noted that Mr. Donohue questioned why he did not receive copies of appellant's correspondence as he had been her authorized representative since 1974. The claims examiner stated, "To my recollection there was no 'flag' that he is the representative in the paper part, but while I was reviewing the case I discovered that he is and placed his name in the computer system as the rep[resentative]."

At the hearing, held on March 19, 2003, Mr. Donohue argued that the Office had ignored his representation of appellant. He contended that the Office should not rely on Dr. Dorsey's report as the Office did not send him a letter regarding the second opinion examination.

Appellant submitted additional medical evidence concerning her vision and a magnetic resonance imaging (MRI) scan of her shoulder.

By decision dated June 18, 2003, the hearing representative affirmed the Office's August 7, 2002 decision.

On July 17, 2003 appellant, through her representative, requested reconsideration and submitted additional medical evidence. In a decision dated October 10, 2003, the Office denied modification of the June 18, 2003 decision.

Appellant, through her representative, again requested reconsideration on December 4, 2003 and submitted medical evidence. The Office denied modification in a decision dated February 14, 2004.

On May 20, 2004 appellant, through her representative, requested reconsideration and enclosed more medical evidence.

In a decision dated June 18, 2004, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was irrelevant and immaterial and thus, insufficient to warrant merit review.

LEGAL PRECEDENT -- ISSUE 1

The Office's regulations provide:

> "A properly appointed representative who is recognized by [the Office] may make a request or give direction to [the Office] regarding the claims process, including

> a hearing. This authority includes presenting or eliciting evidence, making arguments on facts or the law and obtaining information from the case file, to the same extent as the claimant. Any notice requirements contained in this part or the Federal Employees' Compensation Act, is fully satisfied if served on the representative and has the same force and effect as if sent to the claimant."[4]

The Office's procedure manual states, "Any letter intended for a claimant, either directly or as the recipient of a copy, should be sent to the authorized attorney or other legal representative."[5]

Section 8123(a) of the Act states, in pertinent part:

> "An employee shall submit to examination by a medical officer of the United States or by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at the times and places as may be reasonably required. The employee may have a physician designated and paid by her present to participate in the examination."[6]

ANALYSIS

The Office acknowledged Mr. Donohue as appellant's authorized representative. The Office sent him copies of its September 13, 1995 wage-earning capacity determination and its letter placing appellant on the periodic rolls on April 7, 1998. In a report of telephone call dated August 21, 2002, a claims examiner reviewed the case and ascertained that Mr. Donohue was authorized as appellant's representative. The Office, however, failed to provide him with a copy of its March 27, 2002 letter referring appellant for a second opinion evaluation and its June 14, 2002 letter advising her that it had found the position of video coding system technician suitable and providing her 30 days to accept or provide reasons for her refusal. Regarding the Office's referral of appellant for a second opinion evaluation, the Board has held that, under 20 C.F.R. § 10.144, the Office's failure to notify the representative of the referral of appellant for a second opinion examination denied a claimant the statutory right "to have a physician designated and paid by [the claimant] present to participate in the examination."[7] 20 C.F.R. § 10.700(c), which replaced section 10.144, effective January 4, 1999, provides:

> "A properly appointed representative who is recognized by [the Office] may make a request or give direction to [the Office] regarding the claims process, including a hearing. This authority includes presenting or eliciting evidence, making arguments on facts or the law and obtaining information from the case file, to the same extent as the claimant. Any notice requirements contained in this part or the

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[4] 20 C.F.R. § 10.700(c); *see also Sara K. Pearce*, 51 ECAB 517 (2000).

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *File Maintenance and Management,* Chapter 2.400.12 (October 1998).

[6] 5 U.S.C. § 8123(a).

[7] *Donald J. Knight*, 47 ECAB 706 (1996).

Act is fully satisfied if served on the representative and has the same force and effect as if sent to the claimant."[8]

The Board finds that the Office was required to send appellant's representative, Mr. Donohue, a copy of the letter referring her for the second opinion evaluation. The applicable regulation at section 10.700(c) provides significant powers to the representative, including the right to make arguments, obtain information and present evidence. Office procedures also mandate notice to a representative of any decision or information sent to a claimant.[9] The failure to notify Mr. Donohue effectively denied appellant the opportunity to have a physician designated and paid by her present to participate in the examination as provided for at section 8123(a). The Office, consequently, is precluded from relying on the opinion of the second opinion physician.

Additionally, the Office failed to inform appellant's representative of its determination that the offered position was suitable and that she had 30 days to accept the position or provide reasons for its refusal. In *Franklin H. Brydon*,[10] the Board held that the Office denied appellant her property interest in not having her benefits terminated by failing to provide her representative with a copy of its 30-day letter finding the position suitable pursuant to section 10.144. The Board has also held that the regulation applicable in this case, section 10.700(c), which replaced section 10.144, prohibits the Office from terminating or suspending benefits without providing notice of its intention to the authorized representative.[11] Appellant, consequently, was entitled to an opportunity to either accept the offered position or to provide reasons for her refusal with the assistance of her representative.

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation benefits under 5 U.S.C. § 8106, on the grounds that she refused an offer of suitable work as it failed to send a copy of the referral for the second opinion examination and its 30-day suitability letter to her authorized representative.[12]

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[8] 20 C.F.R. § 10.700(c); *see also Sara K. Pearce*, 51 ECAB 517 (2000).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *File Maintenance and Management,* Chapter 2.400.12 (October 1998).

[10] 49 ECAB 227 (1997).

[11] *Travis L. Chambers*, 55 ECAB ___ (Docket No. 02-1650, issued April 17, 2003); *Stefanian P. Efflandt*, Docket No. 04-2088 (issued January 28, 2005).

[12] In view of the Board's finding on the merits, the issue of whether the Office properly denied reconsideration pursuant to section 8128 is moot.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 14, 2004 and October 10, 2003 are reversed.

Issued: January 4, 2006
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