United States Department of Labor
Employees' Compensation Appeals Board

PHYLLIS J. McCOY, Appellant	)	
and	)	**Docket No. 05-1491**
	)	**Issued: January 10, 2006**
U.S. POSTAL SERVICE, NORTH HOUSTON PROCESSING & DISTRIBUTION CENTER, Houston, TX, Employer	)	

Appearances:
Phyllis J. McCoy, pro se
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 6, 2005 appellant filed a timely appeal of the April 11, 2005 merit decision of the Office of Workers' Compensation Programs which affirmed the termination of her compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.[1]

ISSUE

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

[1] The record on appeal includes evidence submitted after the Office issued the April 11, 2005 decision. The Board may not consider evidence that was not before the Office at the time it rendered its final decision. 20 C.F.R. § 501.2.

FACTUAL HISTORY

On August 15, 1991 appellant, then a 41-year-old distribution clerk,[2] filed an occupational disease claim which the Office initially accepted for bilateral carpal tunnel syndrome arising on or about June 4, 1990. She underwent a left carpal tunnel release on December 27, 1991 followed by a right carpal tunnel release on February 25, 1992. Appellant returned to limited-duty work on June 29, 1992. She sustained a recurrence of total disability on September 16, 1996 and the Office placed her on the periodic compensation rolls effective February 2, 1997.[3] The Office expanded the claim to include cervical strain and myofascial pain syndrome as accepted conditions.

Dr. David G. Vanderweide, a Board-certified orthopedic surgeon and Office referral physician, examined appellant on April 30, 2004 and found no objective evidence to support any current diagnoses. However, he noted that she had subjective complaints of bilateral arm pain. Dr. Vanderweide stated that appellant no longer manifested findings consistent with carpal tunnel syndrome and there was no evidence to suggest that her ongoing subjective symptoms were caused by the June 4, 1990 employment injury. He related her significant physical restrictions to almost 10 years of deconditioning and chronic use of addictive narcotics. Dr. Vanderweide imposed a permanent restriction of six hours sedentary work.

Appellant's treating physician, Dr. Aaron M. Levine, a Board-certified physiatrist, reviewed Dr. Vanderweide's report and concurred with the finding that appellant was deconditioned. He also noted that she had a chronic pain condition, but he was uncertain as to its etiology. Dr. Levine felt that appellant could not resume her prior work and he recommended a functional capacity evaluation and possible work hardening.

The Office found a conflict of medical opinion and referred appellant for an impartial medical evaluation. In a report dated June 21, 2004, Dr. Patricia Beaver, a Board-certified orthopedic surgeon and impartial medical examiner, diagnosed cervical strain and bilateral carpal tunnel syndrome with bilateral releases. She commented that the record provided her was "relatively scanty" and did not include any of the results of appellant's cervical magnetic resonance imaging (MRI) scans. Dr. Beaver stated that she was permanently restricted to performing sedentary work. She also recommended obtaining a functional capacity evaluation in order to more objectively determine what appellant could do. Dr. Beaver completed a June 21, 2004 work capacity evaluation (Form OWCP-5c). She imposed permanent restrictions of 6 hours sedentary work, with 4 hours walking and standing, 4 hours repetitive wrist movements, 4 hours pushing and pulling up to 25 pounds and 10 minute breaks every 2 hours.

The functional capacity evaluation was performed on July 19 and 23, 2004. Upon reviewing the results, Dr. Beaver submitted another work capacity evaluation dated September 3, 2004. Appellant was still unable to perform her regular duties, but could work full time, with restrictions of 4 hours bending and stooping, 6 hours pushing and pulling up to 35

[2] Multi-position letter sorting machine operator.

[3] Appellant also received a schedule award for 17 percent impairment of the left upper extremity and 27 percent impairment of the right upper extremity.

pounds and 6 hours lifting, with a maximum weight of 35 pounds occasionally and 6 pounds frequently.[4]

On October 5, 2004 the employing establishment offered appellant work as a part-time, modified mail processing clerk. She was expected to work a total of 6 hours per day performing varying duties that included, casing mail on the primary line, checking employees in and out at the guard shack, relief loading and sweeping in automation on the machines and sorting and traying mail on the small parcel and bundle sorting 185 belt.

By letter dated October 20, 2004, the Office informed appellant that it found the offered position medically suitable in accordance with the limitations provided by Dr. Beaver on June 21, 2004. The Office allowed her 30 days to accept the position and arrange for a report date or provide an explanation for refusing the position. Additionally, the Office advised appellant of the consequences under 5 U.S.C. § 8106(c)(2) for refusing an offer of suitable work.

On November 15, 2004 appellant declined the job offer on the advice of Dr. Levine. She contended that the October 5, 2004 job offer did not include a description of the physical requirements of the various duties. Appellant also commented that Dr. Beaver neglected to consider her disc herniation as well as her difficulties performing repetitive work. Dr. Levine provided reports dated October 21 and 26, 2004 in which he noted that Dr. Beaver had not addressed the repetitive activities and overhead activities that were the cause of many of appellant's symptoms. He also commented that the recent functional capacity evaluation provided objective support for his prior assessment of her work limitations. Dr. Levine further stated that the 60 mile drive to the job site was a limiting factor given appellant's upper extremity complaints.

On November 23, 2004 the Office informed appellant that it had considered her arguments regarding the suitability of the offered position and did not find them to be valid. She was reminded of the consequences of refusing an offer of suitable work and the Office afforded her an additional 15 days to accept the position and arrange for a report date.

By decision dated December 8, 2004, the Office terminated appellant's compensation for refusing an offer of suitable work. The Office noted that the employing establishment verified on December 7, 2004 that the job remained available and she continued to refuse the offered position.

Appellant requested reconsideration on February 25, 2005. Dr. Levine provided a December 21, 2004 report and January 21, 2005 treatment notes. Appellant also submitted a January 17, 2005 report from Dr. David I. Howie, an orthopedic surgeon, who diagnosed chronic neck pain with prior workup revealing herniated nucleus pulposus at C5-6 and C6-7. He recommended a repeat cervical MRI scan, which was performed on February 8, 2005 and revealed a three millimeter posterior broad based disc bulge at C5-6 with mild spinal narrowing. In followup on February 16, 2005, Dr. Howie noted that appellant had exhausted all

[4] Dr. Beaver no longer imposed restrictions with respect to walking, standing or repetitive movements involving the wrist.

nonoperative treatment and would refer her to an orthopedic spine surgeon for consideration of an anterior cervical discectomy and fusion at C5-6.

In a decision dated April 11, 2005, the Office denied modification of the December 8, 2004 decision terminating compensation.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[5] Under section 8106(c)(2) of the Federal Employees' Compensation Act the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[6] To justify termination of compensation, the Office must show that the work offered was suitable[7] and must inform appellant of the consequences of refusal to accept such employment.[8] An employee who refuses or neglects to work after suitable work has been offered or secured for her has the burden of showing that such refusal or failure to work was reasonable or justified.[9] Additionally, the employee shall be provided the opportunity to make such a showing before entitlement to compensation is terminated.[10]

ANALYSIS

The Board finds that the employing establishment's October 5, 2004 job offer did not describe the physical requirements of the duties appellant was expected to perform as a part-time, modified mail processing clerk. The applicable regulations provide that an offer of suitable work must be in writing and include a description of the duties of the position, the "physical requirement of those duties" and the date by which the employee is either to return to work or notify the employer of his or her decision to accept or refuse the offer.[11] While the October 5, 2004 job offer identified the date the position was available and included a description of the duties involved, the written offer did not describe the physical requirements of those duties.

As a part-time, modified mail processing clerk, appellant was expected to work a total of six hours a day performing a variety of duties that included, casing mail on the primary line, checking employees in and out at the guard shack, relief loading and sweeping in automation on the machines and sorting and traying mail on small parcel and bundle sorting 185 belt. The job offer form utilized by the employing establishment also included space for a description of the

[5] *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

[6] 5 U.S.C. § 8106(c)(2); 20 C.F.R. § 10.517(a) (1999).

[7] *Arthur C. Reck*, 47 ECAB 339 (1996).

[8] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1972).

[9] 20 C.F.R. § 10.517(a) (1999).

[10] 20 C.F.R. §§ 10.516, 10.517(b) (1999); *John E. Lemker*, 45 ECAB 258, 263 (1993).

[11] 20 C.F.R. § 10.507(d) (1999).

physical requirements of the modified assignment. However, the employing establishment did not specifically describe the physical requirements, but merely noted that the offered position was "In accordance with [employing establishment] regulations and within [appellant's] medical restrictions/limitations."

The information provided in the October 5, 2004 job offer does not put appellant on notice regarding the physical requirements of the duties she would be expected to perform. The October 5, 2004 job offer is too vague for the Office to have reasonably concluded that the modified mail processing clerk position was suitable and presumably in accordance with the restrictions outlined by the impartial medical examiner on June 21 and September 3, 2004. The Office failed to explain why it found part-time work suitable when Dr. Beaver indicated on the September 3, 2004 Form OWCP-5c that appellant was capable of working eight hours per day.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate compensation.

ORDER

IT IS HEREBY ORDERED THAT the April 11, 2005 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 10, 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