United States Department of Labor
Employees' Compensation Appeals Board

SANYAL VALCOURT, Appellant	)	
and	)	**Docket No. 06-322**
	)	**Issued: May 1, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Jamaica, NY, Employer	)	

Appearances:
Paul Kalker, 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 22, 2005 appellant filed a timely appeal of a September 14, 2005 merit decision of the Office of Workers' Compensation Programs which affirmed the termination of appellant's compensation on the grounds that she 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 on appeal is whether the Office met its burden of proof in terminating appellant's compensation on May 27, 2004 on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On December 24, 2002 appellant, then a 38-year-old mail handler, filed a traumatic injury claim alleging that on December 14, 2002 she sustained injuries to her chest, back and left foot when she was pinned between two postal containers. Appellant stopped work on December 15, 2002. The Office accepted the claim for cervical, thoracic and lumbar spine sprain, and bilateral shoulder sprain.

Appellant was initially treated on December 14, 2002 by Dr. Jamil M. Abraham, a Board-certified pediatrician, who diagnosed headaches, cervical sprains, right and left shoulder sprains, contusion of the chest, thoracic sprain and lumbar sprain. In a December 17, 2002 report, Dr. Abraham J. Lock, Board-certified in internal medicine, noted appellant's history of injury and treatment. He diagnosed postconcussion syndrome, cervical, thoracic and lumbar spine sprains with radiculitis and ruled out discogenic disease and lumbar spine stenosis secondary to a herniated disc. Dr. Lock also diagnosed a left greater than right shoulder sprain with acromioclavicular joint disease, a left greater than right hip sprain and ruled out a rotator cuff tear and sub1uxation. He recommended continued physical therapy and continued to treat appellant.[1]

In a January 28, 2003 report, Dr. Ki Ho Moon, a Board-certified orthopedic surgeon and treating physician, diagnosed cervical spine radiculopathy, traumatic arthropathy of both shoulders and low back derangement. He continued appellant's physical therapy. In a February 14, 2003 report, Dr. Ira Casson, a Board-certified neurologist and an attending physician, opined that appellant "probably had bilateral cervical radiculopathies" and there "probably is also an element of double crush syndrome with coexisting-median nerve compressions at the wrist. The patient also has evidence of bilateral lumbar radiculopathies." Dr. Casson found appellant to be totally disabled. In a March 13, 2003 report, Dr. Peter H. Hollis, a Board-certified neurosurgeon, diagnosed "lumbar pain syndrome with a mechanical and left radicular component." He requested authorization for a lumbar myelogram and post myelo computerized tomography (CT) scan.

Appellant continued to receive treatment from Dr. Lock, who opined that appellant was totally disabled and could not return to work.

On May 7, 2003 appellant was examined by Dr. Robert Zaretsky, a Board-certified orthopedic surgeon and fitness-for-duty physician, who reviewed appellant's history of injury. He opined that appellant's work-related injuries of lumbosacral sprain/strains, and bilateral shoulder sprain/strains had resolved. He also noted that appellant had herniated cervical and lumbar discs by history and noted objective evidence of a moderate partial disability. Dr. Zaretsky advised that there was no need for further testing and indicated that appellant should continue with physical therapy at a frequency of three times a week for an additional six weeks. He also indicated that there was a causal relationship between appellant's complaints and the work-related injury.

In a June 26, 2003 lumbar CT myelogram, Dr. Jeffery P. Drucker, a Board-certified diagnostic radiologist, diagnosed a small to moderate right paracentral disc herniation at L4-5 and degenerative disc disease at L5-S1 along with fairly lateral disc bulges with accompanying posterolateral osteophytes suggestive of impingement at the L5 nerve roots.

By letters dated June 28, 2003, the Office referred appellant for a second opinion examination to Dr. William R. Buschmann, a Board-certified orthopedic surgeon, and Dr. Burton S. Diamond, a Board-certified neurologist.

[1] Appellant also underwent several diagnostic tests, including a magnetic resonance imaging (MRI) scan of the cervical spine, right shoulder and lumbar spine.

In a July 21, 2003 report, Dr. Buschmann addressed appellant's history of injury and treatment and opined that appellant had a moderate disability and could perform activities of daily living without restrictions. He advised that appellant was able to return to light duty doing "sedentary work with no lifting over 15 pounds."

In a July 22, 2003 report, Dr. Diamond opined that appellant had a mild partial disability with partial causality as appellant had preexisting neck and back pain from previous injuries. He noted that her symptomatology was an aggravation of a preexisting problem and advised that appellant could work with restrictions of no bending or lifting over 20 pounds. Dr. Diamond opined that appellant could perform all other functions of her occupation and her restrictions were permanent.

The Office found a conflict of medical opinion between Dr. Lock and Dr. Buschmann and Dr. Diamond.

On September 18, 2003 the Office referred appellant, together with a statement of accepted facts, and the medical record to Dr. Jacob M. Toledano, a Board-certified orthopedic surgeon, selected as the impartial medical specialist.

The Office received additional reports from Dr. Lock, who opined that appellant was completely disabled and in need of physical therapy.

In a February 19, 2004 report, Dr. Toledano reviewed appellant's history of injury and treatment and observed that appellant was in no apparent distress. He reported detailed examination findings, noting normal alignment of the cervical spine, the shoulders were leveled with no evidence of generalized or focal atrophy or fasciculation of the upper extremities. The thoracolumbar spine was normal. Dr. Toledano reviewed diagnostic test results and noted that there was no evidence of any recent trauma or post-traumatic changes, no dislocation and no evidence of a rotator cuff tear, although there was evidence of degenerative disc changes at L5-S1 and bulging, which were unrelated to the employment-related injury of December 14, 2002. He determined that appellant had preexisting and unrelated multilevel lumbar spondylosis at L5-S1 and L4-5, degenerative disc disease with disc space narrowing, gas within the disc space, sclerosis along the adjacent bony endplates, as well as posterolateral osteophytes. Dr. Toledano appellant's functional examination to be "excellent" and opined that appellant was mildly and partially disabled from an orthopedic point of view and could return to work for eight hours per day. He restricted lifting or carrying weights over 25 to 30 pounds. Dr. Toledano advised that there was no further need for physical therapy.

In reports dated March 12, 2004, Dr. Michael A. Tugetman, Board-certified in family medicine, diagnosed postconcussion syndrome, cervical and lumbar spine sprains and bilateral shoulder sprain. He checked a box "yes" in response to a question as to whether appellant's condition was caused or aggravated by an employment activity. Dr. Tugetman recommended physical therapy and advised that appellant was totally disabled from December 14, 2002 and continuing.

By letter dated March 19, 2004, the employing establishment advised appellant that she was being provided a limited-duty job offer as a full-time mail handler utilizing the restrictions

provided by Dr. Toledano, the impartial medical examiner. The March 11, 2004 limited-duty position was comprised of approximately 2 hours and 40 minutes of facing letter class mail in trays for automation and manual operations. It was also comprised of being seated at a facing table with a support chair with a back, and having her arms at the level of the table. The position noted that lifting or carrying was not to exceed 25 to 30 pounds.

On March 19, 2004 the Office found that the position offered by the employing establishment was suitable to her physical restrictions within the meaning of 5 U.S.C. § 8106(c). The Office advised appellant that the employing establishment confirmed that the position remained available. The Office explained that the position of a full-time mail handler on limited duty at the employing establishment was suitable and in accordance with her medical conditions and that she had 30 days to accept the position. The Office advised appellant that if she failed to report to the offered position and failed to demonstrate that the failure was justified, her right to compensation would be terminated.[2]

On March 28, 2004 appellant refused the job offer, contending that she was "medically unable to accept."

In an April 22, 2004 report, Dr. Abraham diagnosed neck sprain, low back derangement, cervical radiculopathy, lumbar radiculopathy and traumatic arthropathy of the shoulder joint. He also ruled out rotator cuff syndrome and advised referring appellant to a physiatrist, pain management specialist or another impartial medical evaluation.

In an April 27, 2004 letter, the Office advised appellant that her reasons for refusing the offered position were insufficient. The Office afforded appellant 15 additional days in which to accept the position without penalty. If she did not, a final decision under 5 U.S.C. § 8106(c)(2) would be issued. The Office noted that no further reasons for refusal would be considered.

In a May 12, 2004 report, Dr. Ishrat Khan, a Board-certified physiatrist, diagnosed cervical and lumbar spine sprain, bilateral shoulder sprain and advised continued physical therapy.

In a memorandum of telephone call dated May 25, 2004, the Office determined that the job offer remained available.

In a decision dated May 27, 2004, the Office terminated appellant's compensation benefits finding that she had failed to accept suitable work after it was offered to her. The Office found that appellant's reasons for refusing the job offer were not acceptable.

In a July 8, 2004 report, Dr. Khan diagnosed cervical and lumbar spine sprain, bilateral shoulder pain and headaches. He requested authorization for physical therapy, as well as an orthopedic and neurological evaluation.

[2] The notice was mailed to appellant's address of record.

In a July 26, 2004 report, Dr. Abraham diagnosed neck sprain, low back derangement and traumatic arthropathy of the shoulder joint, ruled out rotator cuff syndrome and questioned carpal tunnel syndrome.

In a July 29, 2004 report, Dr. Khan repeated his diagnosis and again requested authorization for physical therapy.

In a July 30, 2004 report, Dr. Casson opined that appellant had bilateral carpal tunnel syndromes (CTS) and a cervical sprain-type injury along with problems in the shoulders. He also indicated that appellant had chronic lumbar radiculopathies with bulging and/or herniated discs and opined that appellant might benefit from hand surgery treatment for her CTS and neurological intervention for her low back. Dr. Casson advised that appellant was totally disabled.

In a September 27, 2004 report, Dr. Paul Miller, a Board-certified orthopedic surgeon and treating physician, advised that appellant was seen on that date with regard to an injury of December 14, 2002. He related that "the patient states that while working 3,000 pounds of mail fell on her and she sustained injuries to her arms, chest, neck and lower back." Dr. Miller diagnosed residual sprain, cervical spine with radiculitis, sprain of the lumbosacral spine with disc degeneration of L5-S1, and opined that appellant had a permanent partial disability. He opined that appellant's findings were "causally related to the accident as described above which is a competent producing mechanism" and requested authorization for physical therapy. Dr. Miller submitted additional reports indicating appellant was totally disabled.

By letter dated December 28, 2004, appellant's representative requested reconsideration. He alleged that appellant's employment-related injuries were more extensive than were originally accepted by the Office and that it failed to develop the medical evidence. Appellant's representative alleged that the second opinion examination was not warranted and thus insufficient to create a conflict. He alleged that the report of the impartial medical examiner was deficient and that appellant was unable to perform the limited-duty position. Appellant's representative contended that the July 30, 2004 report from Dr. Casson, appellant's physician, supported continuing disability.

By decision dated September 14, 2005, the Office denied modification of the May 27, 2004 decision.

LEGAL PRECEDENT

Section 8106(c)(2)[3] of the Federal Employees' Compensation Act provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to compensation. 5 U.S.C. § 8106(c) 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." It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting

[3] 5 U.S.C. § 8106(c).

to perform suitable work.[4] To justify such a termination, the Office must show that the work offered was suitable.[5] An employee who refuses or neglects to work after suitable work has been offered to her has the burden of showing that such refusal to work was justified.[6]

ANALYSIS

The Office accepted that appellant sustained a cervical, thoracic and lumbar spine sprain and bilateral shoulder sprains. The Office authorized a lumbar myelogram and postmyelogram CT scan and physical therapy. The Office terminated her compensation on May 27, 2004 based on appellant's refusal of suitable work. The Board finds that the Office established that the offered position of March 11, 2004 was suitable.

On September 18, 2003 the Office determined that there was a conflict in medical opinion between Dr. Lock, appellant's treating physician, who treated her and advised that she was totally disabled to work, and Dr. Buschmann, the second opinion orthopedic surgeon, and Dr. Diamond, the second opinion neurologist, who opined that appellant was able to work for eight hours with restrictions. The Office referred appellant to Dr. Toledano to resolve the conflict. In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[7] In this case, Dr. Toledano opined that appellant could return to work for "eight hours per day, while refraining from lifting or carrying weights over 25 to 30 pounds." The employing establishment observed Dr. Toledano's restrictions in offering appellant the modified-duty position. The Office found that the offered position of March 11, 2004 was suitable to appellant's restrictions.

The Board notes that Dr. Toledano, as the impartial medical examiner, had complete knowledge of the relevant facts, examined appellant and clearly opined that appellant could return to work subject to the restrictions set forth in his February 19, 2004 report. Dr. Toledano noted detailed findings on examination and found that appellant's functional examination was "excellent." His opinion, as the impartial medical examiner, is entitled to special weight and his 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.[8]

To properly terminate compensation under section 8106(c), the Office must provide appellant notice of its finding that an offered position is suitable and give her an opportunity to accept or provide reasons for declining the position.[9] The Office properly followed its

[4] *Henry P. Gilmore*, 46 ECAB 709 (1995).

[5] *John E. Lemker*, 45 ECAB 258 (1993).

[6] *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.517(a).

[7] *Gloria J. Godfrey*, 52 ECAB 486 (2001).

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

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

procedural requirements in this case. By letter dated March 19, 2004, the Office advised appellant that a partially disabled employee who refused suitable work was not entitled to compensation, that the offered position had been found suitable and allotted her 30 days to either accept or provide reasons for refusing the position.[10] She responded by refusing the revised job offer, contending it was medically unsuitable. The Office also received an April 22, 2004 report in which Dr. Abraham repeated his prior diagnoses and suggested referring appellant to a physiatrist, pain management specialist or to another impartial medical specialist. However, he did not address the suitability of the offered position. This evidence was insufficient to show that the offered position was not medically suitable. The medical evidence of record thus, establishes that, at the time the job offer was made, appellant was capable of performing the modified position.

Thereafter, on April 27, 2004, the Office advised appellant that the reasons given for not accepting the job offer were unacceptable. The Office advised appellant that she had 15 additional days to accept the offer without penalty, and if she did not a final decision under 5 U.S.C. § 8106(c)(2) would be made. Appellant did not respond; however, the Office received a May 12, 2004 report from Dr. Khan, who provided a diagnosis and advised continued physical therapy. He did not address the job offer or its suitability. Therefore, appellant did not submit medical evidence which showed that the offered position was not medically suitable.[11] Thus, under section 8106 of the Act, her compensation was properly terminated.

As the Office met its burden of proof to terminate appellant's compensation based on her refusal of suitable work, the burden then shifted to appellant to show that her refusal to work in that position was justified.[12]

Following the Office's May 27, 2004 decision terminating appellant's compensation benefits, appellant submitted several additional medical reports. These included reports dated July 8 and 29, 2004 from Dr. Khan and a July 26, 2004 report from Dr. Abraham, which listed several diagnoses. She also submitted a July 30, 2004 report in which Dr. Casson provided a diagnosis, including CTS, which was not an accepted condition and opined that appellant was totally disabled. These reports are insufficient to establish that the position offered appellant was unsuitable. The physicians did not provide a reasoned opinion explaining how or why appellant's diagnosed conditions prevented her from performing the job duties of the selected position at the time her compensation was terminated.

Appellant also provided a September 27, 2004 report in which Dr. Miller noted that appellant's history of injury included that "while working 3,000 pounds of mail fell on her and she sustained injuries to her arms, chest, neck and lower back." He subsequently indicated that

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

[11] *See Les Rich*, 54 ECAB 290 (2003).

[12] *See Ronald M. Jones*, 52 ECAB 190 (2000).

appellant remained totally disabled. However, the Board notes that his history of injury was incorrect.[13] It is well established that medical reports must be based on a complete and accurate factual and medical background, and medical opinions based on an incomplete or inaccurate history are of little probative value.[14] Furthermore, he did not specifically address the suitability of the modified position. Thus, his report is insufficient to establish that the offered position was unsuitable as he did not explain how any specific diagnosed conditions prevented her from performing the job duties of the offered modified position. This evidence is insufficient to meet appellant's burden of proof.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's wage-loss compensation effective May 27, 2004 on the grounds that she refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the September 14, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 1, 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

[13] For example, Dr. Abraham's more contemporaneous December 17, 2002 report indicated that appellant was pinned between two postal containers "each weighing up to 1,000 pounds." Neither this report nor any evidence contemporaneous with the injury makes mention of 3,000 pounds of mail falling on appellant.

[14] *Douglas M. McQuaid*, 52 ECAB 382 (2001).