

)	
N.C., Appellant)	
)	
and)	Docket No. 06-722
)	Issued: October 2, 2006
U.S. POSTAL SERVICE, CAMPION ROAD)	
POST OFFICE, New Hartford, NY, Employer)	
)	

Case Submitted on the Record

DECISION AND ORDER

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

On February 6, 2006 appellant filed a timely appeal from an Office of Workers' Compensation Programs' February 23, 2005 nonmerit decision denying her November 24, 2004 request for a merit review and a November 9, 2005 merit decision affirming a prior termination of her monetary compensation under section 8106(c)(2) of the Federal Employees' Compensation Act and affirming a prior denial of a schedule award claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501(d)(3), the Board has jurisdiction over the merits of the claim and the February 23, 2005 nonmerit decision.

The issues are: (1) whether the Office properly terminated appellant's compensation under section 8106(c)(2) of the Act on the grounds that she refused an offer of suitable work; (2) whether the Office properly denied appellant's claim for a schedule award on the grounds that she was no longer eligible to receive monetary compensation as she refused an offer of suitable work; and (3) whether the Office properly denied appellant's November 24, 2004 request for a merit review.

FACTUAL HISTORY

The Office accepted that on or before January 28, 1999 appellant, then a 44-year-old letter carrier, sustained bilateral carpal tunnel syndrome and left lateral epicondylitis due to repetitive upper extremity motions in the performance of duty. The Office later expanded the claim to accept tendinitis of the left forearm, degenerative arthritis of the basal joint of the left thumb necessitating arthroplasty and a recurrence of disability from May 24 to June 13, 2000. Appellant returned to light-duty clerical work on June 14, 2000 with “no use of left arm to lift, push, pull or carry.” The employing establishment noted that, as of May 24, 2000, Dr. Andrew D. Goodman, an attending Board-certified neurologist of professorial rank specializing in neuroimmunology, found appellant medically unable to deliver mail due to nonoccupational multiple sclerosis.

Appellant submitted reports regarding the accepted upper extremity conditions and her preexisting multiple sclerosis.

From February 26, 1999 to July 13, 2000, appellant was diagnosed and treated for left lateral epicondylitis and bilateral carpal tunnel syndrome by Dr. Daniel J. Murphy, Jr., an attending Board-certified orthopedic surgeon, Dr. Deborah J. Armbrust, a Board-certified family practitioner and Dr. John J. Cambareri, a Board-certified orthopedic surgeon.

In a May 24, 2000 certificate, Dr. Goodman diagnosed tendinitis of the left arm and multiple sclerosis symptoms. He restricted appellant to working no more than four days a week. Dr. Goodman found appellant totally disabled for work from May 16 to July 12, 2000, due to fatigue and sensory distortion caused by multiple sclerosis.

In September 8 and October 3, 2000 reports, Dr. Joseph A. Mannino, an attending Board-certified orthopedic surgeon, described appellant’s duties as a letter carrier and noted her history of multiple sclerosis. He diagnosed a collapsed C6-7 disc with compression of the neural foramina and cervical radiculopathy.¹ Dr. Mannino noted work restrictions due to left forearm tendinitis. He held appellant off work from May 24 to June 14, 2000 due to left forearm tendinitis.

From February 26, 2002 to March 11, 2003, appellant sought treatment for basal joint arthritis of the left thumb, bilateral carpal tunnel syndrome and left lateral epicondylitis from Dr. Greg S. Orlando and Dr. Richard M. Sleeper, attending Board-certified plastic surgeons specializing in hand surgery and Dr. Marguerite H. Sasson, an attending Board-certified family practitioner. Each physician noted restrictions against repetitive upper extremity motion.²

Beginning on June 19, 2003, Dr. Mannino diagnosed arthritis of the basal joint of the left thumb. He performed left basal joint arthroplasty on August 13, 2003.

¹ November 18, 1998 and February 4, 1999 imaging studies showed degenerative cervical disc disease from C5-7.

² On January 17, 2003 appellant claimed a schedule award for permanent impairment of both upper extremities. She enclosed a January 2, 2003 letter from Dr. Mannino, offering percentages of impairment but noting that appellant might require surgery. In a February 24, 2003 letter, the Office advised appellant that her schedule award claim was premature as her physician opined that she had not reached maximum medical improvement.

Appellant stopped work as of August 13, 2003 and did not return. She received wage-loss compensation on the daily rolls beginning August 14, 2003 and on the periodic rolls effective October 5, 2003. In an October 28, 2003 letter, the Office advised appellant that “[r]efusal by a partially disabled employee to seek, accept or continue suitable work is lawful grounds for the reduction or termination of compensation.” Appellant signed the advisement on November 21, 2003.

Dr. Mannino submitted progress notes through November 25, 2003. In December 31, 2003 reports, he opined that appellant’s carpal tunnel syndrome and left lateral epicondylitis had improved significantly but had not yet stabilized. He stated that appellant could perform restricted duty eight hours a day. Dr. Mannino noted restrictions due to carpal tunnel syndrome and left lateral epicondylitis, including restricting pushing, pulling and lifting to 20 pounds and limiting repetitive movement of the wrists and elbows.

Appellant’s application for disability retirement benefits through the Office of Personnel Management (OPM) was approved on January 9, 2004.

In a January 15, 2004 report, Dr. Francis R. Constantine, an attending Board-certified internist, noted appellant’s complaints of right hip pain. On examination, he noted slightly diminished right grip strength.

In a February 5, 2004 report, Dr. Mannino noted that appellant had retired from the employing establishment and obtained private sector employment where she could better control her schedule and activity level. He noted improvement in the strength and range of motion in the left thumb.

On February 12, 2004 the employing establishment offered appellant a permanent modified clerk position in Fayetteville, New York. The work schedule was 7:00 am to 5:00 p.m. Monday, Tuesday, Thursday, Friday and Saturday, with Wednesday and Sunday off. Appellant would be assigned to answer telephones, file, photocopy, perform data entry, process nixie mail and prepare carrier dispatches. The position limited lifting, pulling and pushing with the left arm to 20 pounds, limited repetitive movements of the left elbow, left wrist and right hand. The job was described as primarily sedentary.

In a February 13, 2004 letter, the Office advised appellant that the February 12, 2004 job offer was suitable work and that she had 30 days in which to accept the offer or provide good cause for refusal. The Office noted that, under section 8106(c)(2) of the Act, a partially disabled employee who refused or neglected to work after suitable work was offered was not entitled to compensation. The Office specified that, if appellant refused the offered position or failed to report for duty when scheduled, “without reasonable cause, [her] compensation benefits w[ould] be terminated.”

On March 11, 2004 appellant elected retirement benefits in preference to benefits under the Act, effective January 25, 2004.

In a March 16, 2004 letter, the Office advised appellant that her retirement was not a sufficient reason for refusing the offered modified clerk position. The Office noted that it would not consider any further reasons to justify her refusal of the job offer. The Office reminded

appellant of the penalty provision under section 8106(c)(2) of the Act, that, if she refused the offer or failed to report for work within 15 days, her benefits would be terminated.

By decision dated April 7, 2004, the Office terminated appellant's monetary compensation benefits effective that day³ on the grounds that she refused an offer of suitable work under section 8106(c)(2) of the Act. The Office noted that the offered modified clerk position was within Dr. Mannino's restrictions. The Office found that appellant's disability retirement was insufficient grounds for her refusal of the February 12, 2004 job offer. The Office noted that appellant remained entitled to medical benefits.

On May 11, 2004 appellant claimed a schedule award. She submitted a March 28, 2004 report from Dr. Mannino opining that, according to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, appellant had a 40 percent impairment to the left upper extremity due to the combined effects of carpal tunnel syndrome, metacarpal arthroplasty and left lateral epicondylitis. Dr. Mannino found a 25 percent impairment of the right upper extremity due to carpal tunnel syndrome and arthritis.

By decision dated September 24, 2004, the Office denied appellant's request for a schedule award on the grounds that she was not eligible for additional compensation after refusing an offer of suitable work.

In a November 24, 2004 letter, appellant requested reconsideration. She asserted that she was forced to retire due to the disabling effects of nonoccupational multiple sclerosis and osteoarthritis. Appellant contended that, as part of her application for disability retirement, the employing establishment found her unable to work and that, therefore, the February 13, 2004 job offer was made in bad faith. She asserted that she remained entitled to a schedule award as she was retired at the time of the light-duty job offer. Appellant submitted a second copy of Dr. Sleeper's May 28, 2002 report.

By nonmerit decision dated February 23, 2005, the Office denied reconsideration of the April 7, 2004 decision on the grounds that the evidence submitted in support thereof were irrelevant or repetitious.

In an August 11, 2005 letter and accompanying affidavit, appellant requested reconsideration of the April 7 and September 24, 2004 decisions. She asserted that the Office erred by failing to consider her multiple sclerosis in determining that the position offered on February 12, 2004 was suitable work. Appellant contended that the employing establishment was well aware of her condition before it offered her the job. She submitted additional evidence.⁴

³ The record indicates that appellant's monetary compensation terminated effective March 21, 2004.

⁴ In a March 8, 2005 report, Dr. Mannino diagnosed basal joint osteoarthritis of the right thumb and recommended surgery. In an April 4, 2005 letter, the Office advised appellant that a right thumb condition had not been accepted and that treatment would not be authorized until she submitted sufficient medical evidence to establish causal relationship.

In February 28 and September 9, 2003 reports, Dr. Ute Dreiner, an attending Board-certified internist and rheumatologist, noted that appellant missed work regularly due to fatigue from multiple sclerosis and the symptoms of osteoarthritis. In March 18 and November 3, 2003 reports, Dr. Goodman diagnosed relapsing multiple sclerosis with fatigue interfering with her work.

Appellant applied for OPM disability retirement benefits on December 2, 2003 due to multiple sclerosis. On February 6, 2004 the Social Security Administration (SSA) approved disability benefits beginning in February 12, 2004 for disability commencing August 12, 2003.

In a June 17, 2005 report, Dr. Goodman noted treating appellant since January 24, 2000 for blurred vision, extremity weakness and episodes of paresthesias. He stated that appellant's severe fatigue related to multiple sclerosis prevented her from performing the modified clerk position offered on February 13, 2004. Dr. Goodman explained that the eight-hour position, coupled with a long commute, created a 12-hour workday. "With her degree of fatigue, she would not be able to consistently work those hours." Dr. Goodman also noted that the position did not provide two consecutive rest days "which would prevent her from resting adequately after working a full week." He characterized the proposed work schedule as "impossible [and] maybe dangerous as well." Dr. Goodman opined that appellant's osteoarthritis would make lifting 20 pounds painful.⁵ In a July 25, 2005 report, he opined that even sitting could exhaust appellant and the other activities described in the February 13, 2004 job offer would cause overwhelming fatigue.

By decision November 9, 2005, the Office denied modification of the September 24, 2004 decision denying a schedule award on the grounds that the evidence submitted was insufficient to warrant modification. The Office also affirmed the April 7, 2004 termination decision, finding that the February 13, 2004 job offer was suitable work. The Office noted that appellant's multiple sclerosis was not work related and that her symptoms began after the accepted injuries. The Office, therefore, found that it correctly excluded the condition when considering whether the February 13, 2004 job offer was suitable work. The Office thus found that Dr. Goodman's reports were insufficient to warrant modification of the prior decisions.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁶ In this case, the Office terminated appellant's compensation under section 8106(c)(2) of the Act, which 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."⁷

⁵ Appellant also submitted professional information about Dr. Goodman.

⁶ *Linda D. Guerrero*, 54 ECAB 556 (2003); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁷ 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

Section 8106(c) will be narrowly construed as it serves as a penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.⁸ Section 10.517(a) of the Act's implementing regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured by the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.⁹ Pursuant to section 10.516, the employee shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.¹⁰

To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.¹¹ It is well established that the Office must consider preexisting and subsequently acquired conditions in evaluating the suitability of an offered position, whether occupationally related or not.¹² The Office's procedures provide that, if the medical record documents "a condition which has arisen since the compensable injury and this condition disables the claimant from the offered job, the job will be considered unsuitable (even if the subsequently-acquired condition is not work related)."¹³

ANALYSIS

In this case, in its April 7, 2004 decision, the Office terminated appellant's monetary compensation under section 8106(c)(2) of the Act¹⁴ on the grounds that she refused an offer of suitable work. In its November 9, 2005 decision affirming the April 7, 2004 decision, the Office found that as appellant's multiple sclerosis was not accepted as work related, the Office correctly excluded the condition when evaluating whether the February 12, 2004 job offer was suitable work. However, this finding is in error.

As set forth above, the Office must consider both accepted and nonoccupational conditions in evaluating the suitability of an offered position.¹⁵ Therefore, the Office should have considered whether appellant's multiple sclerosis, a nonoccupational condition, would have disabled her from performing the offered modified clerk position. But it did not do so.

⁸ *Joan F. Burke*, 54 ECAB 406 (2003); see *Robert Dickerson*, 46 ECAB 1002 (1995).

⁹ 20 C.F.R. § 10.517(a); *Ronald M. Jones*, 52 ECAB 190 (2000).

¹⁰ 20 C.F.R. § 10.516.

¹¹ *Ronald M. Jones*, *supra* note 9.

¹² *Richard P. Cortes*, 56 ECAB ____ (Docket No. 04-1561, issued December 21, 2004).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity, Offers of Employment*, Chapter 2.814(b)(4) (December 1993).

¹⁴ 5 U.S.C. § 8106(c)(2).

¹⁵ *Richard P. Cortes*, *supra* note 12.

In determining that the February 12, 2004 job offer was suitable work, the Office appears to have relied on the December 31, 2003 restrictions offered by Dr. Mannino, an attending Board-certified orthopedic surgeon, who found appellant able to perform limited duty for eight hours a day, with restrictions on upper extremity activities due to carpal tunnel syndrome and left lateral epicondylitis. Dr. Mannino limited pushing, pulling and lifting to 20 pounds and restricted repetitive movement of the wrists and elbows. While the offered position appears to be within these restrictions, they pertained only to the accepted carpal tunnel and epicondylitis conditions. Dr. Mannino did not mention appellant's multiple sclerosis or its impact on appellant's ability to work. There was ample evidence of record prior to the April 7, 2004 decision that appellant's multiple sclerosis adversely impacted her ability to work. She submitted May 24 and June 9, 2000 reports from Dr. Goodman, an attending Board-certified neurologist of professorial rank and a specialist in the treatment of multiple sclerosis. Dr. Goodman opined that appellant could work no more than four days a week due to fatigue and other symptoms associated with multiple sclerosis. The Office must consider both occupational and nonoccupational conditions in evaluating the suitability of an offered position.¹⁶ The Board finds that the Office erred by failing to consider appellant's multiple sclerosis in evaluating the February 12, 2004 job offer. Therefore, the Board finds that the offered modified clerk position was not established as suitable work.

The Board further finds that the second issue regarding the schedule award is not in posture for decision. The Office denied the claim on the grounds that appellant was no longer eligible to receive a schedule award following the termination of her monetary compensation on the grounds she refused an offer of suitable work. However, as the termination must be reversed, the case must be remanded to the Office for development of the schedule award claim. Following such development as the Office deems necessary, the Office shall issue an appropriate decision in the case.

The third issue regarding the Office's denial of a merit review is moot.

CONCLUSION

The Board finds that the Office improperly terminated appellant's monetary compensation benefits on the grounds that she refused an offer of suitable work, as the February 12, 2004 job offer was not proven to be suitable work. The case will be remanded to the Office for appropriate development.

¹⁶ *Richard P. Cortes, supra note 12*; Federal (FECA) Procedure Manual, Chapter 2.814(b)(4), *supra* note 13.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 9, 2005 is reversed in part regarding the termination of appellant's monetary compensation benefits and set aside in part regarding the denial of the schedule award claim. The February 23, 2005 decision is set aside. The case is remanded to the Office for further development consistent with this opinion.

Issued: October 2, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board