United States Department of Labor
Employees' Compensation Appeals Board

B.M., Appellant	)	
and	)	**Docket No. 08-495**
	)	**Issued: August 4, 2008**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Chillicothe, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 10, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' April 9 and November 11, 2007 merit decisions concerning the termination of her compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation effective April 9, 2007 on the grounds that she abandoned suitable work.

FACTUAL HISTORY

The Office accepted that on November 4, 1999 appellant, then a 37-year-old food service worker,[1] sustained a right shoulder sprain, bilateral rotator cuff tears and left shoulder impingement when she was pinned between a cart and a door at work. She underwent right

[1] Appellant worked for four hours per day.

shoulder surgeries in March and December 2000 and September 2004. The procedures were authorized by the Office.

Appellant had intermittent periods of partial and total disability and received appropriate disability compensation from the Office.[2] By 2004 she received her primary medical care for her upper extremity conditions from Dr. Brian S. Cohen, a Board-certified orthopedic surgeon. In an April 3, 2006 report, Dr. James Rutherford, a Board-certified orthopedic surgeon, indicated that appellant had some residuals of her employment injuries, which prevented her from performing her date-of-injury job. He determined that she could perform limited-duty work. Dr. Rutherford indicated that appellant could lift, push or pull up to 10 pounds for up to two and one-half hours per day and reach for up to two and one-half hours per day. He stated that she could not reach above her shoulders.

On July 10, 2007 Dr. Cohen performed left shoulder surgery, including an arthroscopic subacromial decompression, distal clavicle resection and debridement of a partial thickness rotator cuff tear. In a September 1, 2006 report, he stated that appellant could lift, push or pull up to 10 pounds for up to two hours per day and reach for up to two and one-half hours per day. Dr. Cohen indicated that she could sit, walk, reach, twist, operate a vehicle, squat, kneel and engage in repetitive wrist motions for eight hours per day. He noted that appellant could not climb, engage in repetitive elbow motions or reach above her shoulders. Dr. Cohen indicated that appellant could work for eight hours per day.

On October 20, 2006 the employing establishment offered appellant a limited-duty position as a food service worker for four hours per day. The position involved assembling meals for food service and performing inventory tasks. It required lifting, pushing or pulling up to 10 pounds for up to two hours per day, but did not require climbing, engaging in repetitive elbow motions or reaching above the shoulders. Appellant accepted the position and began performing it on November 13, 2006. She last worked in the position on November 28, 2006 and indicated that she could not return to work because she was having car trouble.

In a January 31, 2007 letter, the Office advised appellant of its determination that the food service position that she stopped performing after November 28, 2006 constituted suitable work. It indicated that there was no medical evidence to support that appellant was physically unable to work the job or that there had been a change in her medical condition. The Office stated that car trouble was not a valid excuse for failure to return to work. It indicated that it had confirmed that the position was still available.[3] The Office informed appellant that her compensation would be terminated if she did not return to the food service worker position or provide good cause for not doing so within 30 days of the date of the letter.[4]

[2] In a September 3, 2002 decision, the Office determined that appellant's actual wages as a modified food service worker fairly and reasonably represented her wage-earning capacity effective December 30, 2001.

[3] The Office contacted the employing establishment by telephone on January 31, 2007 and confirmed that the position was still available.

[4] The Office asked Dr. Cohen to provide another opinion regarding appellant's ability to perform the food service worker position but it does not appear that Dr. Cohen responded to this request.

Appellant did not respond to the Office's January 31, 2007 letter. In a March 14, 2007 letter, the Office advised appellant that there was no medical evidence to support that she was physically unable to work the job or that there had been a change in her medical condition. It advised appellant that her compensation would be terminated if she did return to the position within 15 days of the date of the letter. The Office contacted the employing establishment by telephone on April 6, 2007 and determined that the food service worker position remained open but that appellant had not returned to work.

In an April 9, 2007 decision, the Office terminated appellant's compensation effective that day on the grounds that she abandoned suitable work. It indicated that the September 1, 2007 report of Dr. Cohen, showed that appellant could perform the duties of the food service worker position. The Office indicated that there was no medical evidence to support that appellant was physically unable to work the job or that there had been a change in her medical condition. It stated that car trouble was not a valid excuse for failure to return to work.

Appellant submitted a January 10, 2007 report in which Dr. Cohen stated, "She has no use of the right shoulder at or above shoulder level and limited use below shoulder level. With regards to the left shoulder, she has very little use at or above shoulder level, but better use below shoulder level." She also submitted reports of Dr. Cohen dated between May 2004 and September 2006 and physical therapy notes dated between March and September 2006.

Appellant requested a hearing before an Office hearing representative in connection with the Office's April 9, 2007 termination decision. At the September 19, 2007 hearing, she, argued that the food service worker position was not suitable because it was a part-time position. Appellant also argued that having car trouble was a valid reason for not returning to the position.

In a November 2, 2007 decision, the Office hearing representative affirmed the April 9, 2007 decision. He found that appellant had not submitted medical evidence or argument justifying her failure to return to work in the food service worker position.

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees' Compensation Act 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."[5] However, to justify such termination, the Office must show that the work offered was suitable.[6] 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.[7]

[5] 5 U.S.C. § 8106(c)(2).

[6] *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

[7] 20 C.F.R. § 10.124; *see Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

ANALYSIS

The Office accepted that on November 4, 1999 appellant sustained a right shoulder sprain, bilateral rotator cuff tears and left shoulder impingement due to an incident when she was pinned between a cart and a door at work. Appellant underwent right shoulder surgeries in March and December 2000 and September 2004 and left shoulder surgery in July 2007. On November 13, 2006 she began working in a limited-duty position for the employing establishment as a food service worker for four hours per day. The position required lifting, pushing or pulling up to 10 pounds for up to two hours per day, but did not require climbing, engaging in repetitive elbow motions or reaching above the shoulders. Appellant last worked in the position on November 28, 2006 and indicated that she could not return to work because she was having car trouble. The Office terminated appellant's compensation effective April 9, 2007 on the grounds that she abandoned suitable work.

The evidence of record shows that appellant was capable of performing the food service worker position to which she started performing on November 13, 2006 and which the Office determined to constitute suitable work. In a September 1, 2006 report, Dr. Cohen, an attending Board-certified orthopedic surgeon, stated that appellant could lift, push or pull up to 10 pounds for up to two hours per day and reach for up to two and one-half hours per day. He noted that appellant could not climb, engage in repetitive elbow motions or reach above her shoulders.[8] Dr. Cohen indicated that appellant could work for eight hours per day. The Board notes that the duties of the food service worker position are well within the work restrictions recommended by Dr. Cohen. There is no medical evidence of record showing that appellant's medical condition worsened between September 1 and November 28, 2006, the date she last worked after only working in the position for about two weeks.

The Board finds that the Office established that the food service worker position that appellant began performing on November 13, 2006 constituted suitable work. As noted, once the Office has established that a particular position is suitable, an employee who abandons suitable work or otherwise neglects to work after suitable work has been offered to her has the burden of showing that such abandonment or neglect was justified. The Board has carefully reviewed the evidence and argument submitted by appellant in support of her work stoppage in the food service worker position and notes that it is not sufficient to justify her abandonment of the position.

Appellant submitted a January 10, 2007 report in which Dr. Cohen stated, "She has no use of the right shoulder at or above shoulder level and limited use below shoulder level. With regards to the left shoulder, she has very little use at or above shoulder level, but better use below shoulder level." However, Dr. Cohen did not address whether appellant could not perform the food service worker position around the time she stopped work in late November 2007.[9] Appellant also submitted reports of Dr. Cohen dated between May 2004 and September 2006, but these reports provide no opinion on her medical condition around the time she stopped

[8] Dr. Cohen stated that appellant could sit, walk, reach, twist, operate a vehicle, squat, kneel and engage in repetitive wrist motions for eight hours per day.

[9] The Board notes that the position did not require reaching above the shoulders.

work.[10] She argued that the food service worker position was not suitable because it was a part-time position. Appellant also claimed that having car trouble was a valid reason for not returning to the position. However, her contentions are not supported by Board precedent. For these reasons, the Office properly terminated appellant compensation effective April 9, 1997 on the grounds that she abandoned suitable work.[11]

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation effective April 9, 1997 on the grounds that she abandoned suitable work.

[10] Appellant submitted physical therapy notes but physical therapists are not physicians under the Act and are not qualified to provide the necessary medical evidence to meet a claimant's burden of proof on a medical question. *Jane A. White*, 34 ECAB 515, 518-19 (1983).

[11] The Board notes that the Office complied with its procedural requirements prior to terminating appellant's compensation, including providing her with an opportunity to return to the food service worker position after informing her that her reasons for abandoning the position were not valid; *see generally Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992). The Office properly developed the case as an instance of abandonment of suitable work, particularly given her very brief time working in the food service worker position. Appellant did not claim that she sustained a recurrence of disability due to her employment injuries or changes in the duties of the food service worker position. Nor did she claim that her wage-earning capacity determination should have been modified due to a change in her medical condition. *See generally William M. Bailey*, 51 ECAB 197 (1999).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' November 11 and April 9, 2007 decisions are affirmed.

Issued: August 4, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board