

**United States Department of Labor
Employees' Compensation Appeals Board**

A.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Spokane, WA, Employer**

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**Docket No. 07-2146
Issued: March 21, 2008**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 20, 2007 appellant filed a timely appeal from the June 13, 2007 merit decision of the Office of Workers' Compensation Programs' hearing representative, who affirmed the termination of her monetary compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this termination.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's monetary compensation on the grounds that she refused an offer of suitable work; and (2) whether the Office properly denied her request for subpoenas.

FACTUAL HISTORY

On September 26, 2005 appellant, then a 54-year-old rural carrier, filed an occupational disease claim alleging that she was exposed to repetitive arm motions, high mail volume and stress as a result of her work duties. The Office assigned the claim case number 142043698, and accepted the condition of right rotator cuff strain/tear.¹

With the claim, appellant submitted documents relating to an emotional condition. In a January 23, 2006 letter, the Office advised appellant that the documents pertaining to her emotional condition were ongoing, had occurred prior to her September 18, 2005 work exposure and did not pertain to her current claim. Appellant was advised that she should file a separate claim if she felt her work environment was hazardous to her health. The Office returned such documents without further action.

On December 30, 2005 Dr. Michael H. Kody, an orthopedic surgeon, released appellant to light duty with no repetitive shoulder motions and a 10-pound lifting restriction. However, as the employing establishment was unable to accommodate appellant, the Office compensated appellant for all appropriate periods.

In a March 17, 2006 report, Dr. Terrence D. Rempel, a physician Board-certified in occupational medicine, released appellant to work with the following restrictions: "She can lift continuous right arm 5 pounds, both arms 10 pounds and intermittently right arm 10 pounds, both arms 20 pounds. Lifting restriction is with the right arm below chest level only.... Push and pull on the right side would be 10 minutes continuous, two hours intermittent. [Appellant] should not be working above shoulder level on the right side.... She should not case mail above chest level on the right side and is not to reach above chest level with weight on the right side." On April 17, 2006 Dr. Rempel made the restrictions permanent.

On April 3, 2006 the employing establishment offered appellant a position as a limited-duty rural clerk. The position required her to deliver express and priority mail weighing between 5 to 10 pounds, shred documents and review files for expired documents for no more than two hours per day and use the telephone, file and address labels for approximately one hour per day. Appellant would drive, walk, lift and carry approximately 5 to 10 pounds for no more than two hours per day and sit, stand, bend and reach at a low level for approximately five to six hours per day. In a May 19, 2006 letter, Dr. Rempel approved the job offer.

Appellant declined the position on May 22, 2006. She stated that her emotional state, due to filing a civil lawsuit on December 22, 2005, regarding unacceptable conduct at the employing establishment, left her with negative emotions towards the employing establishment.

¹ This case was subsequently combined with case number 142000722. Under case number 142000722, the Office accepted the condition of bursitis for a March 7, 2001 right shoulder condition and subsequently authorized an April 24, 2002 rotator cuff tear surgery. On December 1, 2003 the Office awarded appellant a schedule award for a three percent permanent impairment to her right arm. By decision dated March 3, 2006, the Office denied appellant's recurrence claim. However, since the March 3, 2006 decision is more than one year prior to the filing of the current appeal with the Board, on August 20, 2007, the Board does not have jurisdiction over that decision. *See* 20 C.F.R. § 501.2(c) and 501.3.

In a May 30, 2006 letter, the Office advised appellant that the offered position was suitable and the employing establishment confirmed that the position remained available to her. The Office notified appellant of the penalty under 5 U.S.C. § 8106(c)(2) that an employee who refused an offer of suitable work was not entitled to further compensation. The Office afforded her 30 days to accept the offer or provide reasons for her refusal. No additional response was received from appellant.

In a letter dated July 5, 2006, the Office informed appellant that her reasons for refusing the position were unacceptable. The Office allotted her 15 days to accept the position or have her compensation terminated.

Appellant did not accept the position. She submitted a May 16, 2006 letter to the employing establishment regarding its investigation into her allegations of inappropriate conduct and the filing of her civil lawsuit in that matter; an article entitled Brain Check; and a request for a transfer.

A July 18, 2006 report from Rebecca Bohn, MA, a licensed mental health counselor (LMHC) concerning appellant's mental state was also submitted. She advised that appellant was self-referred for stress and depression which she related to "verbal harassment beginning approximately in 1996 by fellow employees." Ms. Bohn stated, "As a result of the harassment, [appellant] has refused to return to work due to fear of further psychological and physiological stress." She diagnosed post-traumatic stress disorder, depressive disorder NOS and strongly recommended a transfer to a new location should appellant seek to return to employment.

By decision dated August 8, 2006, the Office terminated appellant's compensation effective the same date for refusing an offer of suitable work.

On August 27, 2006 appellant requested an oral hearing. In an October 15, 2006 letter, he requested that certain postal employees appear to testify regarding the work environment at the employing establishment. On April 11, 2007 the hearing representative denied this request for subpoenas on the grounds that the evidence appellant wished to present could be obtained without subpoenas being issued and was not relevant to the sanction decision pertaining to the refusal of suitable employment. At the hearing, which was held April 16, 2007, appellant appeared and testified. She stated that she did not accept the offered job as management and coworkers knew about her past employment at a massage parlor, which caused her great stress and she feared she would hurt someone if she went back to work. Appellant related that she was going to file a claim for stress as early as 1999, but the union told her that a stress claim was hard to prove. She noted that she had filed an Equal Employment Opportunity (EEO) complaint in the matter, which was denied. Appellant submitted her statements dated August 31, 2006, April 16 and 25, 2007; a copy of a textbook article pertaining to adrenal function; an undated witness statement from Deborah La Chance, a neighbor, regarding her lost dog and appellant's actions; and a duplicate copy of Ms. Bohn's July 18, 2006 report pertaining to appellant's emotional state.

In a decision dated June 13, 2007, the hearing representative affirmed the termination of appellant's monetary compensation. He found that Ms. Bohn was not a physician under the Act

and, thus, her report was of no probative value in establishing that appellant was medically unable to perform the light-duty position offered by the employing establishment. The hearing representative further found that no other medical evidence was submitted which supported that appellant had an emotional condition as a consequence of the accepted work injury in this claim or that she had any preexisting restrictions or limitations as a result of the emotional condition.

LEGAL PRECEDENT -- ISSUE 1

The Office has authority under section 8106(c)(2) of the Federal Employees' Compensation Act to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered.² The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to future compensation and, for this reason, will be narrowly construed.³ Before compensation can be terminated the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position. In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), the Office has the burden of showing that the work offered to and refused by appellant was suitable.⁴

Office regulations provide that in determining what constitutes suitable work for a particular disabled employee, the Office should consider the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors.⁵ It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.⁶ The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence.⁷

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a right rotator cuff strain/tear as a result of her employment duties. The Office terminated her monetary compensation effective August 8, 2006 based on her refusal of suitable work.

The clear weight of the medical evidence establishes that physically, based on her accepted orthopedic conditions, appellant is capable of performing the duties of the offered

² 5 U.S.C. §§ 8101-8193, 8106(c).

³ *Stephen A. Pasquale*, 57 ECAB ____ (Docket No. 05-614, issued February 8, 2006).

⁴ *M.L.*, 57 ECAB ____ (Docket No. 06-136, issued September 25, 2006).

⁵ 20 C.F.R. § 10.500(b).

⁶ *Richard P. Cortes*, 56 ECAB 200 (2004).

⁷ *Id.*; *Bryant F. Blackmon*, 56 ECAB 752 (2005).

position. Dr. Rempel, appellant's attending physician, released appellant to limited-duty work on March 17, 2006 with restrictions, which he subsequently advised were permanent. The employing establishment offered appellant a modified position based on those restrictions. Dr. Rempel reviewed the modified position and approved the position on May 19, 2006. There is no current medical evidence to the contrary. Thus, the Board finds that appellant's effective refusal of the offered employment is not justified based on physical or orthopedic grounds.

Appellant, however, consistently refused the offered employment based on her emotional state. The evidence reflects that appellant's emotional state arose prior to the injury in this case and is ongoing. As previously noted, the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.⁸ The only evidence of record concerning a stress condition is a July 18, 2006 report from Ms. Bohn, MA, LMHC. To be considered competent medical evidence, a medical report must be from a physician under the Act.⁹ Section 8101(2) provides that a physician includes, surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by state law.¹⁰ A report may not be considered as probative medical evidence if there is no indication that the person completing the report qualifies as a physician as defined in 5 U.S.C. § 8101(2).¹¹ A licensed mental health counselor is not a physician as defined by the Act.¹² Thus, the report from Ms. Bohn is not considered competent medical evidence and has no probative value in establishing that appellant was medically unable to perform the offered position. There is no current psychological or psychiatric opinion of record. Thus, the weight of the medical evidence establishes that, at the time the job offer was made, appellant was capable of performing the offered position.

The Office properly notified appellant of its finding that the offered position was suitable and of the consequences for not accepting a suitable offer. The Office additionally confirmed that the position remained available and allowed her 30 days in which to accept the position. Appellant did not respond. In accord with established regulations, the Office provided appellant an additional 15 days to accept the position prior to termination of compensation.¹³ Appellant asserted that she could not work due to her emotional condition, which she claimed arose from work-related events. The evidence of record indicates that appellant's emotional condition preexisted the current claim and was ongoing. However, she submitted no medical evidence which found her to be totally disabled due to any emotional condition. While appellant also submitted other evidence, such as material pertaining to her EEO complaint, articles pertaining to stress, and an undated witness statement from Ms. La Chance, a neighbor, such evidence is nonmedical in nature and is insufficient to show that the offered position was not medically suitable.

⁸ *Richard P. Cortes*, *supra* note 6.

⁹ *See James Robinson, Jr.*, 53 ECAB 417 (2002).

¹⁰ 5 U.S.C. § 8101(2).

¹¹ *See Phillip L. Barnes*, 55 ECAB 426 (2004).

¹² 5 U.S.C. § 8101(2).

¹³ *See* 20 C.F.R. § 10.516; *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

The Board finds that the job offered was medically and vocationally suitable, and the Office followed its procedures prior to termination of compensation. Accordingly, the Board finds that the Office met its burden of proof to terminate compensation for wage loss effective August 8, 2006.

LEGAL PRECEDENT -- ISSUE 2

Section 8126 of the Act provides that the Secretary of Labor, on any matter within her jurisdiction under this subchapter, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles.¹⁴ Office regulations provide as follows:

A claimant may request a subpoena, but the decision to grant or deny such a request is within the discretion of the hearing representative. The hearing representative may issue subpoenas for the attendance and testimony of witnesses and for the production of books, records, correspondence, papers or other relevant documents. Subpoenas are issued for documents only if they are relevant and cannot be obtained by other means and for witnesses only where oral testimony is the best way to ascertain the facts.¹⁵

Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts and similar criteria. It is not enough to show merely that the evidence could be construed so as to produce a contrary factual conclusion.¹⁶

ANALYSIS -- ISSUE 2

The Office hearing representative denied appellant's request for subpoenas on the grounds that such evidence could be obtained without subpoenas being issued and was not relevant to the sanction decision pertaining to the refusal of suitable employment. The Board notes that, while the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position, appellant did not adequately explain how the testimony of these individuals was directly relevant and why there were no other means by which this evidence could be obtained. Because appellant did not establish that oral testimony was the best way to ascertain the facts, the Board finds no abuse of the hearing representative's discretion in this matter.

¹⁴ 5 U.S.C. § 8126(1).

¹⁵ 20 C.F.R. § 10.619. A decision to deny a subpoena can be appealed only as part of an appeal of any adverse decision that results from the hearing. *Id.* § 10.619(c).

¹⁶ *Dorothy Bernard*, 37 ECAB 124 (1985).

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's disability compensation under 5 U.S.C. § 8106(c)(2) for refusal of suitable work. The Board also finds that the Office hearing representative did not abuse his discretion in denying appellant's request for subpoenas.

ORDER

IT IS HEREBY ORDERED THAT the June 13, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 21, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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