United States Department of Labor
Employees' Compensation Appeals Board

F.N., Appellant	)	
and	)	**Docket No. 09-1095**
	)	**Issued: December 15, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Staten Island, NY, Employer	)	

Appearances:
Paul Kalker, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 17, 2009 appellant, through counsel, filed a timely appeal of the Office of Workers' Compensation Programs' merit decisions dated September 10, 2008 and February 9, 2009 terminating her compensation and schedule award benefits for refusing 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 is whether the Office properly terminated appellant's wage-loss compensation effective September 10, 2008 for refusing an offer of suitable work under 5 U.S.C. § 8106(c).

Counsel contends that the Office improperly relied on the medical reports of an Office referral physician in finding that the offered position was suitable.

FACTUAL HISTORY

On August 29, 2005 appellant, a 38-year-old customer service supervisor, filed a traumatic injury claim alleging that she suffered "mental anguish and stress (anxiety)," due to a

July 9, 2005 confrontation with a subordinate employee at the employing establishment. The employee threatened her, shouted obscenities and threw several objects at her. On November 27, 2006 the Office accepted the claim for post-traumatic stress disorder (PTSD) and paid appropriate compensation for time lost from work. On September 13, 2007 appellant was placed on the periodic rolls.

Appellant was treated by Stephen Randolph, Ph.D., a clinical psychologist. On December 1, 2006 Dr. Randolph diagnosed PTSD and opined that appellant was totally disabled. In a January 17, 2007 work capacity evaluation, he diagnosed PTSD and opined that she was unable to work in her date-of-injury job, which would trigger panic attacks. The record contains reports of monthly visits through October 1, 2007 reflecting his opinion of appellant's continued disability.

The Office referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Alan De La Chapelle, a Board-certified psychiatrist, for a second opinion medical examination. In an October 18, 2007 report, Dr. De La Chapelle reviewed the history of the injury and treatment, noting that appellant had been seeing Dr. Randolph on a weekly basis since March 2006. Appellant reported that she had experienced panic attacks, flashbacks, nightmares of the incident, a depressed mood (due to loss of function) and insomnia due to anxiety, since the accepted incident. Her family physician prescribed the use of Xanax and Wellbutrin. On examination Dr. De La Chapelle found appellant well rested. Appellant was cooperative, with average social skills, good eye contact and appeared to be of average intellect. Her thoughts were well developed, she evidenced no looseness of associations and she related well to the examiner's questions. Appellant was oriented to person, place, time and situation. There was no evidence of delusions, hallucinations or a thought disorder. Recent and remote memory, computational ability, abstract ability, judgment and insight and general fund of knowledge were "good." Appellant displayed an anxious and limited, although reactive, affect. Her mood was dysphoric. Concentration was fair and attention was mildly impaired. There was no evidence of suicidal or homicidal ideation.

Dr. De La Chapelle diagnosed PTSD, chronic and depressive disorder. He opined to a reasonable degree of certainty that her psychiatric condition was causally related to the accepted work-related incident. Dr. De La Chapelle opined that additional psychiatric treatment was reasonable, related and necessary and that she had not achieved maximum medical improvement. He recommended that she continue psychotherapy at the frequency of twice a month for four months and continue with the psychiatric medication that she was currently prescribed. Dr. De La Chapelle concluded that there was a moderate, partial, work-related disability. He indicated that appellant demonstrated some deficits in attention and concentration, as well as fatigue and mood instability due to her psychiatric condition, which in turn would affect her ability to function in full capacity on the job, such as her ability to meet deadlines, supervise subordinates, etc. Dr. De La Chapelle opined that she was able to return to work on a part-time basis, such as four hours per day, with light duties, including more frequent breaks, to minimize stress. He stated that she was to have no contact with the assaultive coworker.

In reports dated December 1, 2007 and January 1 and February 1, 2008, Dr. Randolph continued to treat appellant in psychotherapy on an "as needed" basis. He advised that she was totally disabled.

By letter dated January 14, 2008, the Office forwarded a copy of the October 18, 2007 second opinion report to the employing establishment, together with a request that it offer appellant a permanent position within the restrictions set forth by Dr. De La Chapelle.

On April 16, 2008 the employing establishment offered appellant a part-time (four hours per day) modified customer service supervisor position at the employing establishment. The position included platform street management duties up to two hours per day; various supervisory office duties up to two hours per day; and all other duties of a supervisor within appellant's restrictions. Appellant was informed that the position was available as of April 21, 2008. On June 25, 2008 the employing establishment modified the job offer to include a restriction against any contact between appellant and the employee involved in the July 9, 2005 altercation. Appellant was to work at the Staten Island MPO, and with the exception of the additional restriction, the position offered on June 25, 2008 involved the same duties as the April 16, 2008 job offer. She was informed that the modified customer service supervisor position was available as of July 7, 2008. On July 2, 2008 the employing establishment informed appellant that she had 14 days within which to respond to the job offer.

In a letter dated July 9, 2008, the Office advised appellant that it found the modified customer service supervisor position offered on June 25, 2008 to be suitable, based on Dr. De La Chapelle's October 18, 2007 report. Appellant would be paid for any difference in salary between the offered position and her date-of-injury position. The Office advised appellant that, if she failed to accept the offer or provide valid reasons she believed the position was not suitable within 30 days, her entitlement to wage-loss compensation could be terminated based on her refusal to accept suitable work.

In a letter dated July 15, 2008, appellant's representative contended that her treating physician determined that she remained disabled. In a July 8, 2008 report, Dr. Randolph reiterated his opinion that appellant was totally disabled as a result of her work-related PTSD. Appellant was unable to return to the employing establishment for desensitization treatment or for regular work, due to extreme anxiety upon approaching the premises or environments resembling the premises where the trauma occurred. Dr. Randolph noted that appellant had expressed the hope of being able to perform work in a different setting.

In a letter dated July 24, 2008, the Office advised appellant that the reasons she submitted for refusing the job offer were insufficient to justify her refusal. Appellant was advised that, if she did not accept the position within 15 days, her entitlement to compensation and schedule award benefits would be terminated.

By decision dated September 10, 2008, the Office terminated appellant's entitlement to compensation and schedule award benefits effective that date, on the grounds that she had refused an offer of suitable work.

In a narrative report dated August 19, 2008, Dr. Randolph repeated the history of the July 9, 2005 work incident and his diagnosis of chronic PTSD. He opined that appellant was totally disabled from employment due to her accepted condition. Noting that he had been treating appellant since March 13, 2006, Dr. Randolph addressed her claimed symptoms of depression and anxiety and indicated that she had periodic panic attacks since the incident.

Psychological testing included the Beck Depression Inventory, which revealed a moderate to severe level of depression, and the SCL-90-R, symptom checklist-90-revised, which reflected significantly elevated indices for somaticizing, interpersonal sensitivity, depression, anxiety, hostility, phobia, paranoia and general severity index.

Dr. Randolph stated that cognitive-behavioral treatments of desensitization had been unsuccessful, resulting in uncontrollable emotional, physical and physiological reactions when approaching the site of the original incident, when seeing acquaintances from the work setting, and/or when in situations reminiscent of the original setting, surroundings and people. He opined that appellant was unable to perform the duties of her previous position with the employing establishment, noting that environmental cues triggered stress, intense fear reactions and distressing recollections of the past event as though they were occurring or about to occur in the present, resulting in an inability to focus, concentrate and interact with those she identified as employing establishment personnel.

On October 6, 2008 Dr. Randolph disagreed with Dr. De La Chapelle's opinion that appellant was able to return to her former work environment, or to surroundings resembling or evocative of the original location of the July 9, 2005 assault no matter how "light" or part time her duties. Regardless of the nature of the work performed, he opined that appellant return would likely result in recurring panic attacks, which would preclude her ability to perform work or even physically remain in the work environment. Such emotional and physical stress would be detrimental to her psychological health and, by extrapolation, possibly to her physical health as well. Dr. Randolph suggested that appellant might benefit from a vocational rehabilitation program if it prepared her for work of a nature that would not involve her current employer in any way.

On November 18, 2008 appellant, through counsel, requested reconsideration. Counsel contended that Dr. De La Chapelle's October 18, 2007 report was insufficiently rationalized to provide a basis for the termination of benefits. His opinion that appellant's work-related psychiatric condition would affect her ability to function in a supervisory position was inconsistent with his opinion that she could return to work as a supervisor. In the alternative, it was argued that the Office should obtain a referee opinion to resolve any conflict between appellant's treating physicians and the second opinion physician.

By decision dated February 9, 2009, the Office denied modification of the September 10, 2008 decision. It found that the medical evidence submitted did not support that appellant was incapable of working the limited-duty position that was offered.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[1] Under section 8106(c)(2) of the Federal Employees' Compensation Act, the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the

[1] *Linda D. Guerrero*, 54 ECAB 556 (2003).

employee.[2] To support termination, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[3] 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.[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]

In assessing medical evidence, the number of physicians supporting one position or another is not controlling, the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[8] Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer, medical evidence of inability to do the work or travel to the job or the claimant found other work which fairly and reasonably represents his or her earning capacity (in which case compensation would be adjusted or terminated based on actual earnings). Furthermore, if medical reports document a condition which has arisen since the compensable injury and the condition disables the employee, the job will be considered unsuitable.[9]

Section 10.516 of the Code of Federal Regulations states that the Office will advise the employee that the work offered is suitable and provide 30 days for the employee to accept the job or present any reasons to counter the Office's finding of suitability.[10] Thus, before

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

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

[4] *Joan F. Burke*, 54 ECAB 406 (2003).

[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).

[8] *See Connie Johns*, 44 ECAB 560 (1993).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (July 1997).

[10] 20 C.F.R. § 10.516.

terminating compensation, the Office must review the employee's proffered reasons for refusing or neglecting to work.[11] If the employee presents such reasons and the Office finds them unreasonable, the Office will offer the employee an additional 15 days to accept the job without penalty.[12]

ANALYSIS

The Office terminated appellant's entitlement to wage-loss compensation on the grounds that she refused an offer of suitable work. Based on Dr. De La Chapelle's second opinion report, it found that she was able to perform the duties of a modified customer service supervisor. The issue of whether an employee has the physical ability to perform a modified position is a medical question that must be resolved by probative medical evidence.[13] The Board finds that the medical evidence of record does not establish that appellant was capable of performing the duties of the position offered by the employing establishment on June 25, 2008. Therefore the Office improperly terminated her wage-loss benefits.

Dr. De La Chapelle's October 18, 2007 report does not support appellant's ability to perform the modified supervisor position at the date-of-injury location. He opined that appellant was able to return to work on a part-time basis, such as four hours per day, with light duties, including more frequent breaks, to minimize stress. Dr. De La Chapelle stated that she had a moderate, partial, work-related disability, which was evidenced by deficits in attention and concentration, as well as fatigue and mood instability due to her psychiatric condition. He opined that her disability would affect her ability to function in full capacity on the job, such as her ability to meet deadlines or supervise subordinates. The Board notes that her inability to effectively supervise subordinates would negatively impact her ability to perform the modified supervisor position.

The remaining medical evidence of record supports appellant's position that she is unable to perform the duties of the modified supervisor position. Dr. Randolph, who began treating appellant in March 2006, opined that appellant was totally disabled as a result of her work-related PTSD. He stated that she was unable to return to the employing establishment for desensitization treatment or for regular work, due to extreme anxiety upon approaching the premises or environments resembling the premises where her trauma occurred. Dr. Randolph opined that appellant was not able to return to her former work environment or to surroundings resembling or evocative of the original location of the July 9, 2005 assault, no matter how "light" or part time her duties. Regardless of the nature of the work performed, he opined that her return would likely result in recurring panic attacks, which would preclude her ability to perform work or even physically remain in the work environment.

[11] *See Sandra K. Cummings*, 54 ECAB 493 (2003); *see also Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992) and 20 C.F.R. § 10.516 which codifies the procedures set forth in *Moore*.

[12] *Id.*

[13] *See Gayle Harris*, 52 ECAB 319 (2001).

The Office determined that the supervisor position offered was suitable and in accordance with Dr. De La Chapelle's second opinion report. The Board finds that the medical evidence of record does not establish that appellant was capable of performing the modified supervisor position offered by the employing establishment. Therefore, the Office did not meet its burden of proof to terminate her wage-loss benefits.

CONCLUSION

The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation and schedule award benefits effective September 10, 2008 on the grounds that she refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the February 9, 2009 and September 10, 2008 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: December 15, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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