

FACTUAL HISTORY

Appellant, a 60-year-old distribution clerk, was struck by a bulk mail container at work on July 1, 1998. The Office initially accepted her claim for left shoulder contusion and trapezius strain. The claim was later expanded to include thoracic outlet syndrome (TOS). The Office also approved a March 28, 2003 left first rib resection, performed by Dr. Karim Abdollahi, a Board-certified orthopedic surgeon. Appellant received appropriate wage-loss compensation beginning March 31, 2003.² Following surgery she developed complex regional pain syndrome/reflex sympathetic dystrophy (CRPS/RSD).

On September 16, 2004 the employing establishment offered appellant a full-time, limited-duty assignment as a modified distribution clerk. Appellant was expected to sort and distribute mail into a “HOT CASE” or distribution case. She was also expected to sort nixie mail, sort and case box mail and sort carrier mail. The position description stated that appellant would not be expected to lift anything heavy with her right arm. Appellant’s other duties included working in the registry processing accountable mail. She was not required to use her left upper extremity to perform any overhead work or any heavy pushing, pulling or carrying. The job offer also indicated that casing mail could be accomplished with either extremity. Whenever, any overhead reaching was required, appellant was instructed to use her right upper extremity. The September 16, 2004 modified distribution clerk position was reportedly based on the July 23, 2004 opinion of Dr. Paul Bouz, a Board-certified orthopedic surgeon and impartial medical examiner.³

At the time of her July 23, 2004 examination, appellant’s chief complaints were left-sided neck pain, left shoulder pain, left upper extremity pain and a tingling sensation in the left hand. Dr. Bouz diagnosed musculoligamentous strain of the cervical spine and status post first rib resection as a result of TOS.⁴ He explained that appellant’s left upper extremity pain might be due to stiffness in the shoulder, which she exhibited on physical examination. Dr. Bouz also noted that there was a slight possibility that appellant had RSD. He recommended another two months of pain management therapy and a home exercise program. Further, surgical intervention was not an option. If there was no improvement with pain management therapy, Dr. Bouz advised that appellant would have to accept her condition and learn to live with it. In addition to short-term pain management therapy, he recommended occasional pain and anti-inflammatory medication.⁵ Regarding work restrictions, Dr. Bouz noted that he would restrict

² The Office placed her on the periodic compensation rolls effective September 7, 2003.

³ The Office declared a conflict in medical opinion between appellant’s surgeon, Dr. Abdollahi, and Dr. Bunsri T. Sophon, a Board-certified orthopedic surgeon and Office referral physician. Whereas Dr. Abdollahi continued to find appellant totally disabled, Dr. Sophon’s February 24, 2004 report indicated that she could work with restrictions. He diagnosed cervical strain and left thoracic outlet syndrome, but did not believe appellant had RSD. Dr. Sophon limited appellant to four hours of reaching and no reaching above shoulder level with the left arm. He also imposed a 20-pound restriction with respect to pushing, pulling and lifting. On May 9, 2004 Dr. Abdollahi reviewed Dr. Sophon’s findings and noted his disagreement, particularly with respect to the diagnosis of RSD.

⁴ According to Dr. Bouz, appellant did not presently have TOS.

⁵ Appellant’s then current medications included Neurontin, Vicodin and Tramadol.

appellant from repetitive overhead work with her left upper extremity and from heavy pushing, pulling and carrying with the left upper extremity.⁶

On September 22, 2004 the Office advised appellant that the September 16, 2004 modified distribution clerk position description was considered suitable based on Dr. Bouz' July 23, 2004 report. Appellant was afforded 30 days to either accept the position or submit a written explanation for her refusal.

The Office subsequently received a September 21, 2004 report from Dr. Abdollahi, who reviewed the September 16, 2004 job offer and found that this type of job was "too repetitive" for appellant to perform. Dr. Abdollahi continued to find appellant temporarily totally disabled. He recommended another six weeks of physical therapy to increase her left shoulder range of motion. Dr. Abdollahi also recommended a psychiatric consultation to evaluate and treat appellant's depression, which he attributed to her current disability.

On September 27, 2004 appellant rejected the modified distribution clerk job offer. She explained that she was unable to drive or travel to work due to her chronic pain and the many medications she took for her condition. Appellant also stated that the offered position exceeded the physical limitations established by Dr. Abdollahi.

In a November 13, 2004 report, Dr. Abdollahi reviewed Dr. Bouz' findings and noted his disagreement, particularly with respect to appellant's ability to return to work. He also took issue with Dr. Bouz' opinion regarding future medical treatment and the need for medication. Dr. Abdollahi reiterated that appellant had likely developed depression as a result of her RSD and would require psychiatric care and medications. He also urged the Office to include RSD as an accepted condition. With respect to the September 16, 2004 job offer, Dr. Abdollahi stated that the work required far too much use of the left upper extremity and appellant was "almost certainly likely to aggravate her condition." He continued to find appellant temporarily totally disabled.

Dr. Bouz, the impartial medical examiner, provided a supplemental report on November 19, 2004. He also submitted a work capacity evaluation (Form OWCP-5c). Dr. Bouz found Dr. Abdollahi's apparent restriction from using the left upper extremity "too severe." He explained that appellant was able to use her left upper extremity to a "limited extent and she should be able to lift light objects weighing up to five pounds." Dr. Bouz also expressed agreement with Dr. Sophon's February 24, 2004 restrictions, which he characterized as reasonable. Additionally, he reviewed the September 16, 2004 modified distribution clerk position description and stated that it contained "reasonable work restrictions," which appellant "should be able to perform..." The accompanying work capacity evaluation precluded any reaching above shoulder and imposed a 20-pound weight restriction regarding pushing, pulling and lifting with the left arm.

On January 4, 2005 the Office advised appellant that she had not provided any valid reasons for rejecting the September 16, 2004 job offer. It afforded appellant an additional 15

⁶ Dr. Bouz did not submit a work capacity evaluation (Form OWCP-5c) identifying specific time limitations or weight restrictions.

days to accept the position and make arrangements to report for duty. Appellant was further advised that no additional reasons for refusal would be considered and a failure to accept the position within the allotted timeframe would result in the termination of entitlement to both schedule award benefits and future wage-loss compensation.

On January 12, 2005 the Office received another report from Dr. Abdollahi dated December 28, 2004. Dr. Abdollahi diagnosed left TOS and left shoulder and left upper extremity RSD. He also noted that on December 2, 2004 appellant began seeing a psychologist. Dr. Abdollahi believed that appellant might benefit from antipsychotic medication to better control her depression symptoms. He noted that the Elavil she was currently taking at night did not seem to adequately control her symptoms.

On January 20, 2005 the Office obtained verification from the employing establishment that appellant had not yet returned to work. That same day it issued a decision terminating appellant's entitlement to wage-loss compensation and schedule award benefits.

A few days after issuing its final decision, the Office received a January 17, 2005 letter from appellant's representative. He asked that the Office rescind the January 4, 2005 15-day letter and reconsider its position regarding the suitability of the modified distribution clerk position. Appellant's representative noted, among other things, that the Office did not properly address appellant's reported travel restrictions. Additionally, he noted that appellant's documented medical condition of depression was not considered.

Appellant later submitted additional medical evidence from her psychologist, Cheryl L. Imes, Ph.D. In a January 19, 2005 report, Dr. Imes diagnosed CRPS/RSD and adjustment disorder with depression and anxiety. She had been treating appellant since December 2, 2004 for complaints of depression, anhedonia and poor quality of life. Dr. Imes noted that appellant had regularly attended group psychotherapy sessions.

On January 31, 2005 appellant requested an oral hearing.

Appellant continued to submit monthly progress reports from Dr. Abdollahi, who routinely diagnosed TOS, left shoulder and left upper extremity RSD and depression. Dr. Abdollahi also continued to find appellant totally disabled. In a February 13, 2005 report, he reiterated that the modified distribution clerk position would likely exacerbate appellant's condition. Dr. Abdollahi also indicated that it was unsafe for appellant to drive while on medication. He stated that even if someone drove appellant to work, the shaking and vibrations associated with traveling increased her left shoulder pain. Appellant's medication also reportedly interfered with her ability to function safely in a work environment. In an August 15, 2005 report, Dr. Abdollahi stated that appellant's multiple medications caused side effects, which along with her RSD and depression, were just as limiting as her physical condition.

The Office also received additional psychotherapy progress reports and treatment records from Dr. Imes. In an August 8, 2005 report, Dr. Imes stated that appellant's depression was severe and that it significantly impaired her daily life. According to her appellant was unable to work due to RSD pain, depression and concentration difficulties. Dr. Imes also submitted a January 19, 2006 work capacity evaluation for psychological conditions (Form OWCP-5a). She

indicated that appellant could not work an eight-hour day due to severe pain. Dr. Imes further noted that appellant's pain medications cause her to be drowsy. She also indicated that appellant was severely depressed and her memory and concentration skills were impaired. Dr. Imes related appellant's depression to her medical condition, CRPS/RSD. She further explained that appellant's depression and pain would interfere with her concentration for mail sorting, reading and interacting with others. Additionally, appellant's cognitive processing was slow so it was unlikely that she could keep up with the work. Lastly, Dr. Imes stated that appellant was not ready for vocational rehabilitation and she would need to wean off medications in order to perform any gainful employment.

Appellant's hearing was held on January 25, 2006. By decision dated March 16, 2006, the Branch of Hearings & Review affirmed the Office's January 20, 2005 decision.

On February 25, 2007 appellant again requested reconsideration. In March 2007, the Office expanded appellant's claim to include RSD as an accepted condition.

In an August 6, 2007 decision, the Office reviewed the merits of the claim and denied modification.

LEGAL PRECEDENT

Pursuant to 5 U.S.C. § 8106(c)(2), a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for her is not entitled to compensation.⁷ An employee who refuses or neglects to work after suitable work has been offered or secured for her has the burden to show that this refusal or failure to work was reasonable or justified.⁸

Whether an employee has the physical or psychological ability to perform an offered position is primarily a medical question that must be resolved by the medical evidence.⁹ In evaluating the suitability of a particular position, the Office must consider preexisting and subsequently acquired medical conditions.¹⁰

When the Office considers a job to be suitable, it shall advise the employee of its finding and afford her 30 days to either accept the job or present any reasons to counter the Office's finding of suitability.¹¹ If the employee presents such reasons and the Office determines that the reasons are unacceptable, it will notify the employee of that determination and further inform the employee that she has 15 days in which to accept the offered work without penalty.¹² After

⁷ See 20 C.F.R. § 10.517 (2008).

⁸ *Id.*

⁹ *Gayle Harris*, 52 ECAB 319, 321 (2001).

¹⁰ *Id.*; *Martha A. McConnell*, 50 ECAB 129, 132 (1998).

¹¹ 20 C.F.R. § 10.516.

¹² *Id.* However, the 15-day notification need not explain why the Office found the employee's reasons for refusal unacceptable.

providing the 30-day and 15-day notices, the Office will terminate the employee's entitlement to further compensation.¹³ However, the employee remains entitled to medical benefits.¹⁴

ANALYSIS

Appellant has repeatedly argued that the modified distribution clerk position did not adequately account for her diagnosed depression. The Board finds that the Office did not properly consider whether appellant's depression interfered with her ability to perform the duties of a modified distribution clerk. The Office based its suitability determination on Dr. Bouz' July 23 and November 19, 2004 reports, which did not include a psychological assessment. Although Dr. Bouz was apparently unaware of appellant's depression, the Office was fully aware of this condition prior to issuing the January 20, 2005 decision terminating compensation. As early as September 21, 2004, Dr. Abdollahi reported that appellant was suffering from depression, which he attributed to her RSD. In his December 28, 2004 report, he indicated that appellant was undergoing psychotherapy and taking Elavil for her depression. The Office received both reports prior to issuing the January 20, 2005 decision. But it did not pause to consider whether appellant's depression would interfere with her ability to perform the duties of a modified distribution clerk.

When the matter was pending before the Branch of Hearings & Review appellant's representative argued, among other things, that the Office should have considered the effects of appellant's depression. By the time appellant had her oral hearing in January 2006, the record included several reports from Dr. Imes attesting to the severity of appellant's psychological condition. But noticeably absent from the hearing representative's March 16, 2006 decision is any reference to Dr. Imes or the fact that appellant had been diagnosed with depression. The Office's latest decision similarly fails to address the apparent effects of appellant's depression on her ability to perform the duties of a modified distribution clerk. In evaluating the suitability of a particular position the Office must consider preexisting and subsequently acquired medical conditions.¹⁵ As appellant's depression was not properly taken into account, the Board finds that the Office failed to demonstrate that the modified distribution clerk position was suitable. Accordingly, the termination of appellant's wage-loss compensation effective January 20, 2005 is reversed. Her entitlement to wage-loss compensation is reinstated retroactive to the date of termination.

CONCLUSION

The Board finds that the Office improperly terminated appellant's wage-loss compensation.

¹³ 20 C.F.R. § 10.517(b). This includes compensation for lost wages as well as compensation for any permanent loss of use of a schedule member. *Id.*; see 5 U.S.C. §§ 8105, 8106 and 8107.

¹⁴ 20 C.F.R. § 10.517(b).

¹⁵ *Martha A. McConnell*, *supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the August 6, 2007 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 6, 2009
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