United States Department of Labor
Employees' Compensation Appeals Board

A.C., Appellant	)	
and	)	
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION, MEDICAL CENTER, East Orange, NJ, Employer	)	**Docket No. 09-389** **Issued: October 7, 2009**

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On November 24, 2008 appellant filed a timely appeal from an August 7, 2008 merit decision of the Office of Workers' Compensation Programs' Branch of Hearings and Review affirming the January 9 and February 7, 2008 merit decisions of the Office that terminated her entitlement to wage-loss and schedule award compensation benefits. 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 compensation under 5 U.S.C. § 8106(c)(2) on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On June 25, 2004 appellant, a 66-year-old nurse, alleged that she experienced dizziness after being struck on the head by a patient on April 4, 2003. This claim was accepted for left capsulitis of the shoulder, myalgia and myositis of the neck and shoulder. Appellant stopped

work on April 4, 2003 and returned to work in a limited-duty capacity on April 28, 2003. She filed for recurrence of disability on October 5, 2003. This claim was accepted for cervical radiculopathy and herniated disc at C6-7. Following further development, the Office accepted appellant's claim for bilateral carpal tunnel syndrome.

In an October 18, 2004 report, Dr. Yan Chun Zhang, a Board-certified neurologist, diagnosed appellant with cervical radiculopathy, carpal tunnel syndrome and left supraspinator tendinitis. Because of her cervical radiculopathy and lumbosacral radiculopathy with disc bulging, he recommended that she avoid heavy lifting. Dr. Zhang also asserted that appellant was permanently disabled.

The Office referred appellant, together with a statement of accepted facts and a list of questions, to Dr. David Rubinfeld, a Board-certified orthopedic surgeon, for a second opinion evaluation. By report dated February 21, 2006, Dr. Rubinfeld noted that appellant had returned to work on January 13, 2006 performing limited duties. He reported that physical examination and an electromyogram (EMG) revealed carpal tunnel in both hands. Dr. Rubinfeld opined that appellant's carpal tunnel was produced by repetitive activity involved in computer work. He noted that bilateral carpal tunnel release was indicated. Dr. Rubinfeld opined that appellant was able to perform her normal work but had to limit repetitive hand use to two hours per day. He asserted that her disability was due to carpal tunnel syndrome and was not related to her other accepted conditions.

To resolve the conflict of medical opinion concerning appellant's diagnosis and her continued disability, the Office referred her, the entire medical record including the statement of accepted facts, together with a list of questions, to Dr. Robert Greenblum, a Board-certified orthopedic surgeon for a referee examination. By report dated November 13, 2006, Dr. Greenblum reviewed the history of injury and the medical evidence of record. He noted that appellant was injured at work on April 4, 2003 when she was struck by a patient and she subsequently fell to the floor onto her hands and knees. Dr. Greenblum noted that appellant stated that she has been living with her injuries for years with only minimal improvement and that she has been unable to work for the past couple of years because of her injuries.

Dr. Greenblum reported that examination revealed mild limitation of motion of the neck in all directions. He noted that there was diffuse tenderness in the neck region as well as in all the paracervical musculature and trapezia bilaterally. Examination of appellant's left shoulder revealed abduction and forward elevation were both greater than 135 degrees and that internal rotation appeared to be grossly within normal limits. Examination of both wrists revealed 60 degrees of dorsi and palmar flexion. Dr. Greenblum reported that appellant was able to move both wrists and that sensation appeared to be intact. He noted that a magnetic resonance imaging (MRI) scan of her left shoulder revealed hypertrophic degenerative changes in the acromioclavicular joint region with some mild impingement. An MRI scan of appellant's cervical spine, performed October 7, 2003, revealed degenerative changes with some foraminal encroachments along with evidence of central disc herniation at the C6-7 levels. Finally, Dr. Greenblum reported that results from an EMG and nerve conduction study (NCS) conducted July 23, 2004 were consistent with bilateral nerve entrapment in her wrists. Noting the presence of central disc herniation at C6-7 level, Dr. Greenblum diagnosed appellant with bilateral carpal tunnel syndrome.

Responding to the Office's questions, Dr. Greenblum opined that appellant had recovered from the injuries to her neck, shoulder and lower left extremity that she sustained on April 4, 2003. Concerning appellant's wrists, however, he noted that the EMG and NCS demonstrated the presence of bilateral carpal tunnel syndrome, which he attributed to the type of work she performed and which may have been exacerbated by her fall on April 4, 2003. Dr. Greenblum opined that her injuries were directly related to the April 4, 2003 incident and that continued treatment for both wrists was indicated. He opined that appellant had sustained some mild permanent disability regarding the range of motion of her neck region. As to appellant's carpal tunnel, Dr. Greenblum opined that further treatment was indicated and that she may need to undergo surgical release to relieve her symptoms because she had exhausted conservative treatments.

Dr. Greenblum opined that, although appellant was unable to perform the full duties of her employment as a nurse, she was able to perform her usual job for eight hours per day with restrictions. He limited work activities involving bending/stooping and twisting to a maximum of two hours per day. Dr. Greenblum restricted activities involving lifting, pulling and pushing to no more than 10 pounds and for no more than two hours per day. Also restricted to a maximum of two hours per day were activities involving repetitive movements, squatting, kneeling and climbing.

By letter dated May 2, 2007, the employing establishment offered appellant a limited-duty assignment as a nurse. The position limited activities requiring repetitive wrist and elbow movements to two hours per day. Activities requiring pushing, pulling and lifting were limited to 10 pounds and no more than two hours per day. Also limited to two hours per day were activities requiring squatting, kneeling, climbing, twisting and bending/stooping.

In an April 27, 2007 report (Form CA-20), Dr. Zhang diagnosed appellant with carpal tunnel syndrome and opined that this condition was caused or aggravated by her employment. He checked the box indicating that she had not been advised to return to work.

By letter dated May 4, 2007, appellant reported that she could neither accept nor reject the offered position. She stated that she was in the process of contacting her physician to discuss with him whether the position was suitable.

By decision dated May 8, 2007, the Office notified appellant that it found the offered position suitable to her work capabilities as defined by Dr. Greenblum's report. It noted that, upon acceptance of this position, she would be paid compensation based upon the difference (if any) between the pay of the offered position and the pay of the position on the date of injury. Appellant could accept the position with no penalty. The Office also advised her that she had 30 days from the date of its letter during which she must either accept the position or provide an explanation of the reasons for not accepting it. Finally, it notified appellant that, if she failed to accept the position and failed to demonstrate that such failure was justified, her compensation would be terminated.

In a letter dated May 21, 2007, appellant, through her attorney, submitted two medical reports that her attorney asserted demonstrated that appellant was still disabled as a result of her April 4, 2003 employment injury and that the offered limited-duty position was not suitable

work. In a May 14, 2007 report, Dr. Zhang noted that an EMG and nerve conduction velocity revealed radiculopathy and carpal tunnel syndrome. He diagnosed appellant with bilateral carpal tunnel syndrome, left shoulder cervical radiculopathy and a left shoulder injury. Because appellant reported poor functioning at her prior writing job, Dr. Zhang opined that she was not able to return to work. In subsequent reports, CA-20 forms, Dr. Zhang again diagnosed appellant with carpal tunnel syndrome and checked the box indicating that she was not able to return to work.

By decision dated June 25, 2007, the Office notified appellant that the offered position had been evaluated and found to be suitable and within the restrictions identified by the medical evidence of record. It noted that it had reviewed the recently submitted evidence and found it insufficient to change its determination concerning the suitability of the offered position. The Office advised appellant that, under the penalty provisions of the Federal Employees' Compensation Act, a partially disabled employee who refuses to seek or neglects to accept offered suitable work is not entitled to compensation. It notified her that, if she did not accept the offered position or failed to report for work when scheduled, her compensation benefits would be terminated within 15 days. It noted that appellant would retain her entitlement to medical care.

Appellant submitted a report (Form CA-20) signed by Dr. Zhang bearing a date that is illegible. Dr. Zhang diagnosed her with carpal tunnel syndrome and checked the box indicating that she was not able to return to work. Appellant also submitted a series of CA-20 forms dated August 1, September 17, November 2 and December 10, 2007 in which Dr. Zhang again diagnosed her with carpal tunnel syndrome and checked the box indicating that she was not able to return to work.

Appellant did not accept the offered position, and by decision dated January 9, 2008, the Office terminated compensation, effective January 9, 2008, because the evidence established that she refused suitable work. The Office acknowledged receipt of the report from Dr. Zhang and arguments submitted by appellant's attorney but found this evidence unpersuasive as Dr. Zhang's medical report made no mention of her limitations nor furnished a medical rationale with his opinion. It found the weight of the medical evidence to rest with Dr. Greenblum. This decision was amended and reissued on February 7, 2008.

Appellant disagreed and, through her attorney, requested an oral hearing. A hearing was conducted on May 15, 2008, at which she and her attorney were present. Appellant testified that the offered positions were not suitable work. She stated that she attempted to return to work in a light-duty capacity for four hours per day. Appellant testified that she could not perform the duties associated with this position because of her condition. She would not push gurneys because they exceeded the restrictions provided by her physician and that after a period of time she developed severe pain in her neck and shoulders and dizziness whenever she moved her head. Appellant testified that she still experiences pain in her hands and that both of her hands were swollen, a condition that only becomes worse with use. She testified that she has difficulty driving. Appellant noted that her husband drove her to the hearing and that during the drive she experienced muscle spasms in her neck.

Appellant's attorney argued that the offered position did not match the medical restrictions. He argued that the offered position was essentially a full-time nursing position that involved repetitive motions throughout the day and therefore there was no way the position could be successfully performed with a two-hour restriction on repetitive motions. Appellant's attorney also argued that the offered position was the same position she unsuccessfully attempted to do for four hours per day in February 2006. He argued that appellant could not do this position in February 2006 and that an eight-hour position would also not be suitable. Appellant's attorney argued that Dr. Greenblum's report was based on a December 1, 2005 statement of accepted facts and therefore did not reflect a year of activity which included appellant's unsuccessful attempt to return to work in February 2006. He also argued that Dr. Greenblum's report established that appellant was not capable of performing the full duties as a nurse and therefore the offered position was not suitable work as it was a full eight-hour nursing position.

By note dated June 9, 2008, the employing establishment reported that the offered position prepared patients for procedures and required a basic assessment involving documentation that was abbreviated and templated requiring only the point and click of the mouse to complete. The employing establishment noted that it was aware of appellant's limitations and that assistance was provided to appellant. It noted that the offered position was very modified compared to that of a regular nurse. The employing establishment acknowledged that the restrictions included a 10-pound lifting, pulling and pushing limitation and therefore reported that appellant would not be required to push a gurney. It reported that the offered position involved duties that allowed for nonrepetitive motion of her wrists and elbows such as escorting ambulatory patients to procedure areas, speaking with patients, providing education and performing patient callbacks. The employing establishment noted that the preprocedure requirements consisted mostly of patient interviews and completion of necessary consent forms, preprocedure checklists and laboratory results.

Responding to her attorneys' arguments, the employing establishment reported that the offered position was not a full-time position and conformed with the restrictions provided by Dr. Greenblum. It asserted that the position it offered in February 2006 was based on the limitation provided by appellant's attending physician. The employing establishment noted that the only restriction at that time limited her lifting to 25 pounds and a four-hour workday. The position that was currently being offered to appellant was based on the restrictions identified by Dr. Greenblum. The employing establishment asserted that under no circumstances would appellant be expected to work beyond her physical limitations.

In a June 24, 2008 note, appellant asserted that her physician, Dr. Zhang, did not release her to the offered position. She alleged that she experienced constant pain in her shoulder and neck as well as swelling in both hands and dizziness. Appellant reported that she has difficulty ambulating due to pain in her left hip and swelling in her left knee. She alleged that the offered position was the same position she unsuccessfully attempted to perform in 2006. Appellant argued that she could not tolerate the position in 2006 and did not believe that she could tolerate it now.

By decision dated August 7, 2008, the hearing representative found that the evidence of record demonstrated that appellant had refused, without justification, an offered position that was

medically, vocationally and educationally suitable. Consequently, it affirmed the Office's January 9 and February 7, 2008 decisions.

LEGAL PRECEDENT

Section 8106(c)(2) of the Act states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for him is not entitled to compensation.[1] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be terminated, however, it 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.[2] In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.[3]

With respect to the procedural requirements of termination under 5 U.S.C. § 8106(c), the Board has held that the Office must inform appellant of the consequences of refusal to accept suitable work and allow her an opportunity to provide reasons for refusing the offered position.[4] If appellant presents reasons for refusing the offered position, the Office must inform the employee if it finds the reasons inadequate to justify the refusal of the offered position and afford her a final opportunity to accept the position.[5]

Office regulations state that the Office shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter the Office's finding of suitability. If the employee presents such reasons and the Office determines that the reasons are unacceptable, it will notify the employee of that determination and that he or she has 15 days in which to accept the offered work without penalty. At that point in time, the Office's notification need not state the reasons for finding that the employee's reasons are not acceptable.[6]

Once the Office advises a claimant that his or her reasons for refusing an offered position are unacceptable and that he or she has 15 days to accept the position or have compensation terminated, the claimant submits further reasons and supporting evidence at his or her own risk.

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[1] 5 U.S.C. § 8106(c)(2).

[2] *M.L.*, 57 ECAB 746, 750 (2006)*; Frank J. Sell, Jr.*, 34 ECAB 547, 552 (1983).

[3] *M.L., supra* note 2; *Albert Pineiro*, 51 ECAB 310, 312 (2000).

[4] *Alfred Gomez*, 53 ECAB 149, 150 (2001); *see Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818, 824 (1992).

[5] *Id.*

[6] 20 C.F.R. § 10.516.

Nevertheless, it must consider the reasons and evidence and can then concurrently reject them as unacceptable and terminate compensation.[7]

ANALYSIS

The Office accepted appellant's claim for bilateral carpal tunnel syndrome. It terminated her compensation effective February 7, 2008 because she refused suitable work. The Board finds that the Office met its burden of proof in terminating appellant's compensation under 5 U.S.C. § 8106(c)(2) for refusal of suitable employment effective February 7, 2008 and that she did not establish that her refusal of suitable work was justified.

In developing the medical evidence, the Office properly referred appellant to Dr. Greenblum, a Board-certified orthopedic surgeon, for an impartial medical examination because a conflict of medical opinion arose between Dr. Rubinfeld, the Office's second opinion physician, and Dr. Zhang, appellant's attending physician. Where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[8] The Board finds that Dr. Greenblum's opinion is well rationalized and based on a proper factual and medical history.

Dr. Greenblum accurately summarized the relevant medical evidence, provided detailed findings on examination and reached conclusions about appellant's condition, which comported with his findings.[9] He reported that the EMG and NCS demonstrated the presence of bilateral carpal tunnel syndrome that he attributed to the type of work appellant did and which may have been exacerbated by her fall on April 4, 2003. Dr. Greenblum opined that her injuries were directly related to the April 4, 2003 incident and that continued treatment for both wrists was indicated. He recognized that appellant was unable to perform her full duties of her employment as a nurse.

In a work capacity evaluation, Dr. Greenblum noted that appellant had reached the point of maximum medical improvement. He also reported that she was able to perform her usual job for eight hours per day with restrictions. Work activities involving bending/stooping and twisting were restricted to a maximum of two hours per day. Dr. Greenblum restricted activities involving lifting, pulling and pushing to no more than 10 pounds and for no more than two hours per day. Also restricted to a maximum of two hours per day were activities involving repetitive movements, squatting, kneeling and climbing. The Board finds Dr. Greenblum's report is detailed, well rationalized and based on a proper factual background and therefore is entitled to the special weight accorded an impartial medical examiner.[10]

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[7] *Melvin James*, 55 ECAB 406, 409 (2004); *C.W. Hopkins*, 47 ECAB 725, 727-28 (1996).

[8] *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

[9] *Manuel Gill*, 52 ECAB 282 (2001).

[10] *Darlene R. Kennedy*, 57 ECAB 414 (2006).

On May 2, 2007 the employing establishment offered appellant an eight-hour per day limited-duty position as a nurse that was consistent with Dr. Greenblum's November 13, 2006 report. The position limited activities requiring repetitive wrist and elbow movements to two hours per day. Activities requiring pushing, pulling and lifting were limited to 10 pounds and no more than two hours per day. Also limited to two hours per day were activities requiring squatting, kneeling, climbing, twisting and bending/stooping. The Board notes that the requirements of the modified nurse position are within the work restrictions set by Dr. Greenblum. Accordingly, the Board finds that the medical evidence of record establishes that at the time the job offer was made appellant was capable of performing the modified position.[11]

Prior to terminating compensation under 5 U.S.C. § 8106(c), the Office must first inform the claimant of the consequences of refusal to accept suitable work and allow the claimant an opportunity to provide reasons for refusing the offered position. If the claimant presents reasons for refusing the offered position, it must inform the claimant if it finds the reasons inadequate to justify the refusal of the offered position and afford the claimant a final opportunity to accept the position. If the Office fails to inform appellant of whether or not the reasons offered were sufficient to justify refusal of the suitable work position, it has failed to meet the procedural requirements of section 8106(c)(2).[12]

On May 8, 2007 the Office advised appellant that the offered position was suitable and conformed to the work limitations provided by Dr. Greenblum. It allowed appellant 30 days to accept the position or provide her reasons for refusal. The Office advised that an employee who refuses an offer of suitable work without reasonable cause is not entitled to compensation. Appellant rejected the offered position and, through counsel, submitted additional reports which counsel argued established that the offered position was not medically suitable.

By decision dated June 25, 2007, the Office notified appellant that the offered position had been evaluated and found to be suitable and within the restrictions identified by the medical evidence of record. It noted that it had reviewed the recently submitted evidence and found it insufficient to change its determination concerning the suitability of the offered position. The Office notified appellant that, if she did not accept the offered position or failed to report for work when scheduled, her compensation benefits would be terminated within 15 days. The Board finds the Office has satisfied the procedural requirements of section 8106(c)(2).[13]

The Board has carefully reviewed the medical evidence and appellant's arguments in support of her refusal of the modified nurse position and finds that they are not sufficient to support her refusal of the position. Appellant's attorney argues that the Office failed to establish that the offered position was medically and vocationally suitable work. He asserted that appellant's testimony established that the offered position was not medically suitable and that the

[11] *See John E. Lemker*, 45 ECAB 258 (1993).

[12] *Howard Y. Miyashiro*, 51 ECAB 253 (1999); *Maggie L. Moore*, *supra* note 4, *reaff'd on recon.*, 43 ECAB 818 (1992).

[13] *Id.*

offered position was essentially the same modified light-duty position that appellant unsuccessfully attempted to perform in February 2006. Appellant was unable to perform the position then and, counsel asserted, she definitely could not perform these duties now, particularly eight hours per day.

The Board finds that the evidence of record does not support appellant's view. The determination 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.[14] While counsel argued Dr. Zhang's reports established that appellant is permanently disabled from work and therefore the offered position is not suitable, the Board finds Dr. Zhang's medical reports, as appellant's treating physician, created the conflict of evidence that required the referral to the impartial medical specialist. Although, Dr. Zhang's medical reports are insufficient to overcome the weight accorded Dr. Greenblum's reports.[15] Appellant has not shown that her refusal to work was justified. The weight of the medical evidence continues to support that her accepted conditions did not prevent her from performing the job she was offered.

Furthermore, the record does not establish that the offered position is essentially the same as the position that appellant unsuccessfully attempted in February 2006. The record reflects that, to date, appellant has not accepted the offered position, returned to work or attempted to return to work. Thus, appellant's assertion that the offered position is essentially the same as the one she was offered in February 2006 lacks an adequate foundation because she has not reported for duty and has no first-hand knowledge to support her assessment.

Appellant's attorney argued that Dr. Greenblum's report did not confirm that appellant could perform the offered position because it was based on an out-dated statement of facts. Counsel argued that the statement of facts furnished to Dr. Greenblum was a year old by the time he evaluated appellant and did not include the fact that she unsuccessfully attempted to return to work in February 2006. The Board notes in this regard that Dr. Greenblum questioned appellant regarding her work history since the accepted injury. Furthermore, Dr. Greenblum was provided with the entire medical record, which included the February 21, 2006 report of the second opinion physician who noted that appellant had returned to work in a limited-duty position.

The Office was not required, under its procedural manual, to include in the statement of facts that appellant had unsuccessfully attempted to return to work in February 2006.[16] In securing the opinion of a medical specialist, the Office's procedures note that a statement of accepted facts and questions are to be prepared by the claims examiner for use by the physician.[17] Specifically, the claims examiner is required to correctly set forth the relevant facts of the case, including the employee's date-of-injury, age, job held when injured, the mechanism

[14] *Robert Dickinson*, 46 ECAB 1002 (1995).

[15] *See Virginia Davis-Banks*, 44 ECAB 389 (1993); *Dorothy Sidwell*, 41 ECAB 857 (1990).

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statement of Accepted Facts*, Chapter 2.809.12 (October 2005).

[17] *Id.*

of injury and any conditions claimed or accepted by the Office.[18] The procedural manual also provides that appellant's employment history, including periods of return to full or light duty, is not an essential issue that must be provided in a statement of facts.[19]

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's compensation under 5 U.S.C. § 8106(c)(2) for refusal of suitable employment effective February 7, 2008 and that she did not establish that her refusal of suitable work was justified.

ORDER

IT IS HEREBY ORDERED THAT the August 7, 2008 decision of the Office of Workers' Compensation Programs' Branch of Hearings and Review and the Office is affirmed.

Issued: October 7, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

[18] *Id.* Other information pertaining to medical treatment received the employee's personal habits and off-duty or family activities may be included as the case warrants.

[19] Federal (FECA) Procedure Manual, *supra* note 16 at Chapter 2.809.13 (October 2005).