United States Department of Labor
Employees' Compensation Appeals Board

K.B., Appellant	)	
and	)	**Docket No. 09-1975**
	)	**Issued: April 7, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Little Rock, AK, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 28, 2009 appellant filed a timely appeal from the July 10, 2009 merit decision of the Office of Workers' Compensation Programs concerning the termination of her compensation. 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 effective November 14, 2005 on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

This is the third appeal in this case. In the first appeal, the Board issued a decision on December 15, 2006 affirming the Office's termination of appellant's compensation effective November 14, 2005 for refusing an offer of suitable work.[1] The Board found that the Office

[1] Docket No. 06-1027 (issued December 15, 2006). On September 12, 1997 appellant, then a 32-year-old part-time rural carrier associate, filed an occupational disease claim alleging that she sustained injury to her back by carrying mail at work. The Office accepted that she sustained a lumbar sprain and herniated nucleus pulposus at L4-5 and authorized back surgeries performed on December 17, 1997 and December 13, 1998.

properly relied upon the opinion of Dr. Joe W. Crow, a Board-certified orthopedic surgeon, who served as an impartial medical specialist, in determining that the modified rural carrier associate position offered by the employing establishment in September 2005 was suitable.[2] In a report dated August 15, 2005, Dr. Crow determined that appellant was medically capable of performing this modified-duty position.[3] The Board noted that Dr. Crow detailed appellant's use of medications and diagnosed narcotic habituation, but found that he provided no indication that her use of medications prevented her from working as a modified rural mail carrier associate.[4]

In the second appeal, the Board issued a decision on March 10, 2008 affirming the Office's termination of appellant's compensation effective November 14, 2005 for refusing an offer of suitable work.[5] The Board noted that, because the Office met its burden of proof to terminate appellant's compensation effective November 14, 2005 for refusing an offer of suitable work, it was appellant's burden to show that such refusal to work was justified. The Board found that appellant did not meet this burden because the newly submitted December 6, 2006 report of Dr. John W. Ellis, an attending physician Board-certified in family practice and environmental medicine, did not provide a clear opinion that she could not perform the modified rural carrier associate position around the time that it was offered by the employing establishment in September 2005. The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

In February 2009 appellant again requested reconsideration of her claim and submitted a January 30, 2009 report of Dr. Ellis, who indicated that appellant was evaluated in his office on December 6, 2006. He noted that at the time that appellant was seen she was unable to perform any job duties or work "split shifts" due to the medications she took and "problems that she was having." Dr. Ellis stated:

> "The patient had been on temporary total disability and was unable to work. The patient's medication that she has to take due to her workers' compensation injury does have side effects such as drowsiness, dizziness and problems focusing and concentrating. The patient's medications that she is taking are Norco, Methadone, Lunesta, Zanaflex and Zoloft. All these medications do have the above-

[2] The offered position, which was for 25 hours per week, required sitting, intermittent walking and simple grasping for up to four hours per day and pushing a light-weight roll-around cart which could be pushed with one finger, for up to 30 minutes per day. The job involved working "split shifts" in that it had work hours which included nonwork periods of about three to six hours between morning and afternoon work periods. Appellant refused the offered position in October 2005.

[3] In an accompanying form, Dr. Crow stated that appellant could lift up to 10 pounds for two hours per day, push up to 20 pounds for two hours per day, pull up to 20 pounds for two hours per day and operate a motor vehicle at work for two hours per day. He indicated that appellant should spend less than an hour performing several activities, including twisting, bending, stooping, squatting and kneeling and that she should not engage in climbing. Dr. Crow stated that appellant could perform modified-duty work for eight hours per day.

[4] The Board also found that the other medical evidence of record did not support a finding that appellant's use of medications prevented her from performing the offered position.

[5] Docket No. 07-2078 (issued March 10, 2008).

mentioned side effects. At the time that the patient turned down her job offer it was due to the said medications."[6]

In a July 10, 2009 decision, as appellant failed to meet her burden of proof, the Office affirmed its earlier termination decision effective November 14, 2005 on the grounds that she refused an offer of suitable work. It indicated that the January 30, 2009 report of Dr. Ellis was of limited probative value regarding appellant's ability to perform the position offered by the employing establishment around the time the position was offered.

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."[7] However, to justify such termination, the Office must show that the work offered was suitable.[8] An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[9]

Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[10] In situations 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.[11]

ANALYSIS

The Office accepted that appellant sustained a lumbar sprain and lumbar herniated nucleus pulpous due to the performance of her work duties and authorized two surgeries at L4-5, which were performed in December 1997 and September 1998. It terminated appellant's compensation effective November 14, 2005 on the grounds that she refused an offer of suitable work.

Because the Office met its burden of proof to terminate appellant's compensation effective November 14, 2005 for refusing an offer of suitable work, it is appellant's burden to show that such refusal to work was justified.[12] The Board finds that appellant did not meet her

[6] Dr. Ellis indicated that he attached a report further describing the medications and their doses, but no such report was attached.

[7] 5 U.S.C. § 8106(c)(2).

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

[9] 20 C.F.R. § 10.517; *see Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

[10] 5 U.S.C. § 8123(a).

[11] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

[12] *See supra* note 9.

burden of proof to establish that her refusal of the modified rural carrier associate position offered by the employing establishment was justified. Therefore, the Office's termination of her compensation effective November 14, 2005 was proper.

Appellant submitted a January 30, 2009 report from Dr. Ellis, which indicated that appellant was evaluated in his office on December 6, 2006. Dr. Ellis noted that at the time that appellant was seen she was unable to perform any job duties or work "split shifts" due to the medications she took and "problems that she was having." He described the medications taken by appellant and indicated that they had side effects such as drowsiness, dizziness, and problems focusing and concentrating. Dr. Ellis stated, "At the time that the patient turned down her job offer it was due to the said medications."

The Board finds that Dr. Ellis' opinion is of limited probative value on the relevant issue of the present case as to whether appellant could perform the modified rural carrier associate position around the time that it was offered by the employing establishment in September 2005.[13] Dr. Ellis did not provide any specific findings on examination or diagnostic testing from that time frame. He did not explain how appellant's medical condition in late 2005 prevented her from performing the duties required by the modified rural carrier associate position. Dr. Ellis indicated that appellant had problems with medications but he did not provide any detailed discussion of these problems or explain how they would have prevented her from performing the offered position in late 2005.[14]

Given the limited probative value of Dr. Ellis' report on the relevant issue of the present case, the weight of the medical evidence regarding the suitability of the modified rural carrier associate position would continue to rest with the well-rationalized opinion of the impartial medical specialist, Dr. Crow.[15] For these reasons, appellant did not show that her refusal of the modified rural carrier associate position offered by the employing establishment was justified.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation effective November 14, 2005 on the grounds that she refused an offer of suitable work.

[13] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (finding that a medical opinion not fortified by medical rationale is of little probative value).

[14] In its December 15, 2006 and March 10, 2008 decisions, the Board noted that Dr. Crow detailed appellant's use of medications and diagnosed narcotic habituation, but found that he provided no indication that her use of medications prevented her from working as a modified rural mail carrier associate. The Board further notes that Dr. Ellis did not explain how appellant's medical condition prevented her from working a "split shift."

[15] *See supra* notes 9 and 10.

ORDER

IT IS HEREBY ORDERED THAT the July 10, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 7, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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