United States Department of Labor
Employees' Compensation Appeals Board

M.A., Appellant	)	
and	)	**Docket No. 10-258**
	)	**Issued: December 9, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Pineville, LA, Employer	)	

Appearances:
Daniel E. Broussard, Jr., 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 October 27, 2009 appellant filed an appeal from an April 30, 2009 decision of the Office of Workers' Compensation Programs that terminated her wage-loss compensation on the grounds that she refused 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 compensation benefits effective October 29, 2006 pursuant to 5 U.S.C. § 8106(c). On appeal, appellant's attorney asks that her case be reviewed by the Board.

FACTUAL HISTORY

On December 14, 2004 appellant, then a 26-year-old part-time temporary relief rural carrier, sustained an employment-related cervical sprain/strain, subjective visual disturbance, displaced lumbar intervertebral disc and contusion to the face, neck and scalp when her postal

vehicle was hit from behind.[1] A December 14, 2004 cervical spine x-ray demonstrated muscle spasm but was otherwise unremarkable and a computerized tomography (CT) scan of the brain was negative. A February 7, 2005 magnetic resonance imaging (MRI) scan of the lumbar spine demonstrated mild degenerative changes but no focal areas of impingement. Appellant returned to modified duty for four hours a day on April 19, 2005.

By letter dated June 6, 2005, the Office referred appellant to Dr. John P. Sandifer, Board-certified in orthopedic surgery, for a second opinion evaluation and in a June 22, 2005 report, he provided physical examination findings and diagnosed facet joint arthropathy with mild degenerative disc disease of the lumbar spine with nerve root irritation and cervical strain with nerve root irritation, resolved. Dr. Sandifer advised that the conditions were related to the December 14, 2004 employment injury and that, while she could not return to her regular job as mail carrier, she could perform modified duty and provided restrictions to her physical activity, stating that she should achieve an eight-hour workday in three months and that the restrictions would apply for three months.

On July 26, 2005 Dr. Gerald J. Leglue, Jr., an attending Board-certified physiatrist, advised that appellant should remain off work until reevaluated in approximately one month. Electromyographic (EMG) testing of the lower extremities that day was essentially normal on the right and demonstrated L5 findings on the left. Appellant stopped work that day. In an August 23, 2005 report, Dr. Leglue advised that he had reviewed Dr. Sandifer's report and that she had a progression of symptoms since his evaluation. He noted EMG evidence of a recent nerve injury indicating that appellant could have internal disc derangement and advised that she should be off work until evaluation by Dr. Charles Aprill, a Board-certified radiologist. Appellant was returned to the periodic compensation rolls. On December 6, 2005 Dr. Leglue advised that she could work less than one hour.

The Office determined that a conflict in medical evidence had been created between the opinions of Dr. Leglue and Dr. Sandifer regarding appellant's ability to work and on December 29, 2005 referred her to Dr. Robert E. Holladay, a Board-certified orthopedic surgeon, for an impartial evaluation. In a January 12, 2006 report, Dr. Holladay noted the history of injury and his review of the medical record. He reported appellant's complaints of low back pain with burning in both legs and heels and numbness and tingling in her calves. Physical examination demonstrated full neck range of motion, intact sensation and 5/5 motor strength in both upper extremities with positive Hoffman's signs, greater on the left. When seated or standing, appellant's lower extremities had a tendency to tremble and shake with obvious clonus, left worse than the right, restricted lower extremity range of motion and 4/5 motor strength with fair balance. Dr. Holladay advised that, while appellant continued to have residuals of the December 14, 2004 employment injury, she could return to restricted duty for four hours a day with limitations on standing, walking, bending, stooping, twisting, climbing and crawling and a 10-pound lifting restriction. He also stated that with the objective findings of cervical myelopathy, that was not work related, she was not physically capable of returning to work, advising that she needed an urgent evaluation of her nonwork-related cervical myelopathy condition, to include an upper extremity EMG study and cervical MRI scan, to be followed by

[1] The record indicates that there is a third-party claim in this case.

evaluation by a neurosurgeon and that until she had a full and complete evaluation of this condition, she was not likely to make progress and return to functional activities, both on and off work.

Dr. Leglue continued to submit reports describing appellant's complaints of neck and low back pain with upper extremity paresthesias. In an April 24, 2006 work capacity evaluation, Dr. Holladay advised that she could not perform her usual job due to nonwork-related cervical myelopathy but could work four hours a day with restrictions of four hours sitting; one hour walking and standing; no twisting, bending, stooping, squatting, kneeling or climbing; and pushing and pulling limited to two hours with a lifting restriction of less than 10 pounds. By report dated May 5, 2006, Dr. Leglue advised that he disagreed with Drs. Sandifer's and Holladay's opinions that appellant could return to part-time work, stating that, if she were to be involved with any further significant trauma, she was at an increased risk of spinal cord damage.

On July 14, 2006 the employing establishment offered appellant a part-time position as a modified temporary relief carrier for four hours daily with duties of express mail delivery for up to one hour, answering the telephone for up to one hour and checking Undeliverable Bulk Business Mail for up to two hours. The physical requirements were described as walking, standing and driving intermittently for up to 1 hour; no pushing or pulling over 10 pounds intermittently for up to 2 hours; lifting no more than 10 pounds for 2 hours; and sitting limited to 2 hours, with a 15-minute break after 2 hours of work. By letter dated July 25, 2006, the Office advised appellant that the position offered was suitable. Appellant was notified that if she failed to report to work or failed to demonstrate that the failure was justified, pursuant to section 8106 of the Federal Employees' Compensation Act,[2] her right to compensation for wage loss or a schedule award would be terminated. She was given 30 days to respond.

In reports dated July 26 and August 7, 2006, Dr. Leglue advised that appellant continued to have significant pain and that it was inappropriate for her to work, given the significant abnormalities seen on scans. By letter dated August 25, 2006, the Office advised her that the reasons given for refusing to accept the offered position were insufficient and she was given an additional 15 days to accept. On July 25, 2006 Dr. Leglue advised that appellant should remain off work until evaluated by a neurosurgeon. On September 22, 2006 he noted that she was seen by Dr. Bradley J. Bartholomew, a Board-certified neurosurgeon, who recommended additional diagnostic studies.

By decision dated October 25, 2006, the Office found that the weight of the medical evidence rested with the opinions of Drs. Sandifer and Holladay and terminated appellant's compensation benefits, effective October 29, 2006, on the grounds that she declined an offer of suitable work. In reports dated from November 27, 2006 to January 10, 2007, Dr. Leglue noted her continued complaints of significant neck and low back pain and described her medication regimen. On February 20, 2007 appellant through her attorney, requested reconsideration and submitted her depositions dated June 14, 2005 and November 2, 2006, prepared for her

[2] 5 U.S.C. §§ 8101-8193.

third-party claim, in which she testified regarding the accident, her medical condition and treatment regimen and that her daily activities were limited.

In a September 7, 2006 report, Dr. Bartholomew noted the history of injury, the February 7, 2005 MRI scan findings and appellant's complaints of neck pain and upper extremity numbness, hand weakness and radiating low back pain. On physical examination he noted normal strength in the upper and lower extremities, negative straight leg and Hoffman's tests and intact sensory examination. Neck examination demonstrated spasm and tenderness with normal range of motion. Back examination showed bilateral paravertebral tenderness without spasm and normal range of motion. Dr. Bartholomew recommended MRI scans of the cervical spine and right hip and discography to elucidate the pain generator.

In a November 8, 2006 report, Dr. Randall D. Lea, a Board-certified orthopedic surgeon, described the history of injury and noted his review of medical records and appellant's primary complaint of low back and leg pain with occasional headaches and neck pain. He provided physical examination findings and diagnosed cervical sprain/strain with associated possible cervical myelopathy and lumbar sprain/strain with associated lumbar spondylosis and degenerative disc disease. Dr. Lea advised that appellant was not able to return to work until the cervical myelopathy was clarified but that if she did not have cervical myelopathy, she could work for four hours daily with restrictions to her physical activity including occasional lifting of up to 10 pounds and alternate sitting, standing and walking. In a November 16, 2006 deposition, he described her medical care beginning on December 20, 2004. Dr. Leglue testified that appellant could not return to a part-time sedentary position because it could potentially damage her spinal cord and continued to submit reports reiterating his findings and conclusions.

In a merit decision dated May 25, 2007, the Office reviewed the evidence submitted and denied modification of the October 25, 2006 decision. Dr. Leglue continued to submit reports advising that appellant continued to have neck and low back pain and in a November 29, 2007 report, Dr. Bartholomew advised that physical examination showed normal strength and sensation in the lower extremities with a negative straight leg test and no back spasm but tenderness in bilateral paravertebral areas of the lumbar spine with decreased range of motion due to pain. He performed a lumbar facet block from L3 to S1 on February 13, 2008 and on March 7, 2008 noted her report that she was doing better. Physical examination demonstrated normal strength, sensation and straight leg testing with normal back range of motion and mild bilateral paravertebral tenderness and no spasm. On March 18, 2008 Dr. Leglue released appellant to return to work and on April 1, 2008, he noted that she was working.

On May 21, 2008 appellant, through her attorney, requested reconsideration and submitted handwritten notes from Dr. Bartholomew dated September 7, 2006 and a December 5, 2007 report in which he advised that she could return to light duty. September 13, 2007 MRI scans of the cervical spine and hips demonstrated no significant abnormality and an October 9, 2007 lumbar spine discogram with postdiscogram CT scan were interpreted as normal. On October 17, 2007 Dr. Leglue advised that appellant should remain off work until she had psychological evaluation. In reports dated May 13, 2008, Dr. Aprill noted her complaint of back and buttock pain radiating into both legs. He provided physical examination findings and performed lumbar facet injections on the right at L4-5 and L5-S1. Dr. Aprill advised that

appellant's findings implied chronic right facet joint sprain at L5-S1 and probably L4-5. In reports dated May 30 and June 30, 2008, Dr. Leglue described her medication regimen.

By decision dated August 26, 2008, the Office denied modification of the prior decisions. On January 28, 2009, appellant, through her attorney requested reconsideration and submitted additional medical evidence. On August 12, 2008 Dr. Aprill performed a confirmatory block with denervation at right L3 and L4 medial branches and right L5 dorsal ramus. By report dated August 19, 2008, he noted his review of the February 7, 2005 lumbar MRI scan and the October 19, 2007 lumbar discography with postdiscography CT scan. On October 29, 2008 Dr. Leglue noted that appellant had returned to work as a postal carrier.

In a merit decision dated April 30, 2009, the Office denied modification of the prior decisions.

LEGAL PRECEDENT

Section 8106(c) of the Act provide in pertinent part, "A partially disabled employee who (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[3] It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[4] The implementing regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.[5] To justify termination, the Office must show that the work offered was suitable and that the employing establishment was informed of the consequences of her refusal to accept such employment.[6] In determining what constitutes "suitable work" for a particular disabled employee, the Office considers 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.[7] Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.[8] Section 8106(c) will be narrowly construed as it serves as a penalty provision which may bar an

[3] *Id*. at § 8106(c).

[4] *Joyce M. Doll*, 53 ECAB 790 (2002).

[5] 20 C.F.R. § 10.517(a).

[6] *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[7] 20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB 681 (2004).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5.a(1) (July 1997); *see Lorraine C. Hall*, 51 ECAB 477 (2000).

employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[9]

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 medical evidence.[10] It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.[11]

Section 8123(a) of the Act provides that 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.[12] When 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 on a proper factual background, must be given special weight.[13]

ANALYSIS

The Board finds that the Office did not meet its burden of proof to terminate appellant's monetary compensation on the grounds that she refused a July 14, 2006 offer of suitable work. The Office found that the weight of the medical evidence established that the position was within appellant's physical capabilities. It had determined that a conflict in medical evidence had been created between the opinions of Dr. Leglue, an attending Board-certified physiatrist, and Dr. Sandifer, a Board-certified orthopedic surgeon, who performed a second opinion evaluation for the Office and referred her to Dr. Holladay, also Board-certified in orthopedic surgery, for a referee opinion.

The Board finds that Dr. Holladay's January 12, 2006 report contains inconsistencies such that his opinion is insufficient to establish that appellant can perform the offered position. Dr. Holladay noted the history of injury and his review of the medical record. He provided physical examination findings and advised that, while appellant continued to have residuals of the December 14, 2004 employment injury, she could return to restricted duty for four hours a day with limitations on standing, walking, bending, stooping, twisting, climbing and crawling and a 10-pound lifting restriction. However, Dr. Holladay also advised that she was not physically capable of returning to work due to the cervical myelopathy and needed an urgent evaluation for this nonemployment-related condition, to include an upper extremity and neck EMG study and a cervical MRI scan examination, to be followed by an evaluation by a neurosurgeon. He opined that until appellant had a "full and complete" evaluation of the

[9] *Gloria G. Godfrey*, 52 ECAB 486 (2001).

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

[11] *Richard P. Cortes*, 56 ECAB 200 (2004).

[12] 5 U.S.C. § 8123(a); *see Geraldine Foster*, 54 ECAB 435 (2003).

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

underlying cervical condition, she was not likely to make progress or return to functional activities, either at work or off work.

While the offered position was within the physical restrictions provided by Dr. Holliday in his January 12 and April 24, 2006 reports, he also stated that appellant was not capable of returning to work and stressed that she needed an urgent evaluation for her cervical myelopathy condition. It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.[14] As a penalty provision, section 8106(c)(2) must be narrowly construed.[15] The Board therefore finds that due to the inconsistencies in Dr. Holladay's opinion, the evidence does not establish the suitability of the offered position and the Office did not discharge its burden of proof to justify the termination of appellant's compensation effective October 29, 2006 pursuant to section 8106(c)(2) of the Act.[16]

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits on the grounds that she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(a).

[14] *Id.*

[15] *J.F.*, 60 ECAB ____ (Docket No. 08-439, issued October 24, 2008).

[16] 5 U.S.C. § 8106(c)(2); *see R.B.*, 60 ECAB ____ (Docket No. 08-2154, issued May 8, 2009).

ORDER

IT IS HEREBY ORDERED THAT the April 30, 2009 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 9, 2010
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