United States Department of Labor
Employees' Compensation Appeals Board

T.L., Appellant	)	
	)	**Docket No. 10-734**
and	)	**Issued: December 10, 2010**
DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY, New Cumberland, PA, Employer	)	

Appearances:
Alan J. Shapiro, 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 January 25, 2010 appellant, through counsel, filed a timely appeal of the December 9, 2009 merit decision of an Office of Workers' Compensation Programs terminating her monetary 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 monetary compensation benefits effective May 15, 2009 for refusing an offer of suitable work pursuant to 5 U.S.C. § 8106(c).

FACTUAL HISTORY

The Office accepted that on July 20, 2007 appellant, then a 37-year-old distribution process worker, sustained a Grade 1 acromioclavicular (ACL) sprain/strain of the right shoulder

when she pulled on a tote filled with boxes. It authorized arthroscopic subacromial decompression of the right shoulder and repair of a torn rotator cuff on April 30, 2008.

By letter dated November 10, 2008, the Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Robert F. Draper, a Board-certified orthopedic surgeon, for a second opinion medical examination. Dr. Draper was asked to address all medical diagnoses causally related to the accepted July 20, 2007 employment injury, nonindustrial and preexisting disability, whether she was capable of returning to her usual work duties and, if so, what physical restrictions were recommended, periods of total and/or partial disability related to the accepted employment injury and whether she had any continuing residuals of the injury.

In a November 25, 2008 report, Dr. Draper reviewed a history of appellant's July 20, 2007 employment injury, medical treatment and social and family background. He described a full physical examination which included essentially normal findings related to the respiratory, cardiovascular, gastrointestinal and genitourinary systems. On examination of the cervical spine and upper extremities, Dr. Draper reported muscle spasm and tenderness and diminished range of motion and motor function. He diagnosed impingement syndrome of the right shoulder, adhesive capsulitis or stiff shoulder postoperatively and osteoarthritis of the right ACL joint. Appellant was status postdiagnostic arthroscopy of the right shoulder, mini open acromioplasty and open excision of the distal clavicle. Dr. Draper advised that her impingement syndrome appeared to be directly related to a December 20, 2007 work-related injury.[1] He noted that appellant had preexisting conditions that included degenerative arthritis of the right ACL joint. Dr. Draper advised that she was unable to perform her regular work duties, but was capable of performing light-duty work that did not require lifting more than 10 pounds and overhead use of her right shoulder. He opined that appellant continued to have residuals of her accepted employment-related injury. Dr. Draper recommended physical therapy, as she had not reached maximum medical improvement. He stated that appellant should reach maximum medical improvement on or about March 1, 2009.

By letter dated December 9, 2008, the Office requested that Dr. John R. Frankeny, II, an attending Board-certified orthopedic surgeon, address Dr. Draper's report. In a December 15, 2008 report, Dr. Frankeny agreed with Dr. Draper's opinion that appellant could perform light-duty work with no reaching above the shoulder and no pushing, pulling or lifting more than 10 pounds.

In letters received by the Office on December 16 and 17, 2008, appellant advised the Office that she had relocated from Harrisburg, Pennsylvania to Detroit, Michigan as of December 6, 2008.

On December 19, 2008 the employing establishment offered appellant a modified distribution process worker position in New Cumberland, Pennsylvania effective December 15, 2008 based on Dr. Frankeny's physical restrictions. The duties included checking stock numbers on material in the active item "DP" and "DT" area, which weighed 1 to 25 pounds. This task

[1] It appears that Dr. Draper inadvertently stated that the date of injury was December 20, 2007 rather than July 20, 2007 as he accurately described the accepted employment injury.

could be successfully performed with one hand or arm. The position also required walking up and down each aisle in the active item area looking at stock numbers in totes.

By letter dated December 29, 2008, the Office advised appellant that the offered modified-duty position was available and found suitable to her physical limitations as set forth by Dr. Draper and Dr. Frankeny. Appellant had 30 days to accept the position or provide an explanation for her refusal to accept it. The Office informed her that, if she failed to accept the position or provide a reasonable cause for her refusal, her compensation benefits would be terminated.

On December 26, 2008 appellant refused the offered position on the grounds that she had relocated to Michigan due to extreme family circumstances. She was willing to return to work if suitable work within the restrictions set forth by Dr. Frankeny was available in Michigan.

In a January 7, 2009 report, Dr. Frankeny found that appellant was unable to climb and she could not engage in repetitive use of her right upper extremity.

Reports from appellant's physical therapists indicated that her right shoulder conditions were treated from January 22 to February 3, 2009.

On January 30, 2009 the Office advised appellant that the reasons given for refusing to accept the offered position were not sufficient. Appellant was given an additional 15 days to accept. In an undated letter, received by the Office on February 10, 2009, she refused the offered position stating that her move to Michigan was due to her accepted employment injury. Following appellant's injury, she became extremely depressed and could no longer perform her usual activities without assistance. She had financial problems because she had not been paid since her injury. Appellant also separated from her husband.

In reports dated January 13 and February 17, 2009, Dr. A. Dianne Obayan, Board-certified in physical medicine and rehabilitation, listed essentially normal findings on physical examination of appellant's right upper extremity. On examination of the neck, she reported pain. Dr. Obayan also reported diminished sensation in the right arm. Appellant also had diminished range of motion of the right shoulder. Dr. Obayan advised that appellant was status postrepair of a right supraspinatus tear. Appellant had right ACL joint partial separation and cervical radiculopathy in the right C7 distribution. Dr. Obayan opined that appellant was totally disabled for work.

A January 20, 2009 report, of a physical therapist, certified by Dr. Obayan, addressed the treatment of appellant's right shoulder and cervical pain. Reports of other physical therapists addressed treatment of her right shoulder and cervical pain through March 10, 2009. In an April 25, 2009 report, Dr. Javier L. Beltran, a radiologist, advised that a magnetic resonance imaging scan of appellant's right shoulder demonstrated infraspinatus tendinosis without a tear. He stated that she was status postsubacromial decompression and acromioplasty and Mumford procedure with resection of the distal end of the clavicle.

In a May 15, 2009 decision, the Office terminated appellant's monetary compensation benefits effective that date on the grounds that she refused an offer of suitable work. It noted that the position was still available.

By letter dated May 18, 2009, appellant, through counsel, requested a telephonic hearing with an Office hearing representative.[2] In a May 20, 2009 report, Dr. Larry H. Reid, an osteopath, found that she had a right rotator cuff injury, nerve root irritation of the cervical spine, Grade 1 ACL joint sprain and cervical myocitis. He opined that appellant was totally disabled from March 31 to July 1, 2009. In a June 5, 2009 report, Dr. Reid diagnosed acute post-traumatic cervical disc syndrome at multiple levels, thoracic arthralgia and right shoulder radiculopathy. He stated that appellant could return to work on June 22, 2009 with restrictions. In a July 20, 2009 report, Dr. Richard H. Hallock, a Board-certified orthopedic surgeon, obtained a history of her July 20, 2007 employment injury. He found that she sustained a right shoulder injury. Dr. Hallock advised that appellant could perform limited-duty work with restrictions. In reports dated July 20 and September 1, 2009, Dr. Frankeny advised that she could perform limited-duty work with the same restrictions previously provided.

In a December 9, 2009 decision, an Office hearing representative affirmed the May 15, 2009 termination decision, finding the evidence sufficient to establish that appellant refused an offer of suitable work.[3]

LEGAL PRECEDENT

Section 8106(c) 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.[4] 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.[5] 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.[6]

To support termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of her refusal to accept such employment.[7] In determining what constitutes suitable work for a particular disabled employee, it considers the employee's current physical limitations, whether the work is available within the employee's

[2] The Board notes that appellant relocated to Harrisburg, PA and returned to work at the employing establishment on June 22, 2009.

[3] The Board notes that it appears that the Office hearing representative inadvertently stated that the Office's "January 15, 2004 decision is affirmed in part and reversed in part" rather than the May 15, 2009 decision was affirmed. The case record does not contain a January 15, 2004 termination decision. Further, the hearing representative's decision accurately described and addressed the facts related to the instant claim.

[4] 5 U.S.C. § 8106(c).

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

[6] 20 C.F.R. § 10.517(a).

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

demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors.[8] 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.[9] 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.[10] It is well established under this section of the Act, the Office must consider both preexisting and subsequently acquired conditions in the evaluation of the suitability of an offered position.[11]

ANALYSIS

The Office accepted that on July 20, 2007 appellant sustained Grade 1 ACL sprain/strain of the right shoulder as a result of pulling a tote filled with boxes while working as a distribution process worker. It authorized arthroscopic subacromial decompression and repair of a torn rotator cuff, which she underwent on April 30, 2008. The Office terminated appellant's monetary compensation effective May 19, 2009 on the grounds that she refused an offer of suitable work. The employing establishment offered her a job as a modified distribution process worker on December 19, 2008 and the Office determined that it was suitable on December 29, 2008. The position involved checking stock numbers on material in the active item "DP" and "DT" area, which weighed 1 to 25 pounds and walking up and down each aisle in the active item area looking in totes at stock numbers. In finding the offered position suitable, the Office relied on the opinions of Dr. Draper, an Office referral physician, and Dr. Frankeny, an attending physician.

The Board finds that the medical evidence is sufficient to establish that appellant was capable of performing the modified distribution process worker position. In a November 25, 2008 report, Dr. Draper advised that she could perform light-duty work with restrictions, which included no lifting more than 10 pounds and overhead use of her right shoulder. His opinion was supported by Dr. Frankeny, an attending physician, who agreed in a December 15, 2008 report that appellant could perform light-duty work. Similarly, Dr. Draper restricted her from lifting more than 10 pounds and reaching above the shoulder. Dr. Frankeny also restricted appellant from pushing and pulling more than 10 pounds. Although the December 19, 2008 job offer indicates that lifting 1 to 25 pounds is required while performing the duties of a modified distribution process worker, it notes that this requirement is in accordance with the 10-pound lifting restriction of Dr. Frankeny as the lifting requirement could be successfully performed with one hand or arm. Thus, the lifting requirement for the offered position does not exceed appellant's right shoulder restrictions. The Board finds that the Office established that the modified distribution process worker position offered by the employing establishment was suitable.

[8] 20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB 681 (2004).

[9] 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).

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

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

Once the Office has established that a particular position is suitable, an employee who refuses or neglects to work after suitable work has been offered to her has the burden of showing that such refusal to work was justified. An acceptable reason, if supported by medical evidence, for refusing an offer of suitable work is inability to travel to work.[12] The Office's procedures provide that the inability to travel to work is an acceptable reason if the inability is because of residuals of the employment injury.[13] Appellant contended that her relocation to Detroit, Michigan was a result of her July 20, 2007 employment-related injury as it caused her depression and financial and marital problems.[14] The Board has carefully reviewed the evidence and arguments submitted by her in support of her refusal of the modified distribution process worker position and finds that they are not sufficient to show that relocation is contraindicated by her medical condition. None of the medical evidence provided an opinion finding that she sustained an emotional condition causally related to the accepted July 20, 2007 employment injury. The Board notes that the Office has not accepted appellant's claim for an emotional condition.

The reports of appellant's physical therapists are of no probative value to support her refusal of an offer of suitable work as a physical therapist is not a physician as defined under the Act.[15]

Dr. Beltran's diagnostic test results regarding appellant right shoulder condition did not provide any opinion addressing whether she was capable of performing the modified job. The Board finds that his report is of limited probative value on the issue of suitable work.

Dr. Obayan's 2009 reports found that appellant was totally disabled for work. This evidence is of limited probative value on the issue of suitable work as Dr. Obayan did not provide any explanation for her conclusion that appellant could not work. She only listed essentially normal findings on physical examination and diagnosed right ACL joint partial separation and cervical radiculopathy at C7. Dr. Obayan did not specifically address the modified-duty job offer.

Dr. Reid's reports finding that appellant was totally disabled for work from March 31 to July 1, 2009 are similarly of limited probative value on the issue of suitable work. He did not provide any explanation for his conclusion that she could not work. Dr. Reid found that appellant had acute post-traumatic cervical disc syndrome at multiple levels, thoracic arthralgia and right shoulder radiculopathy. However, he did not present any objective findings to support his diagnoses and opinion on disability. Further, Dr. Reid did not address the modified job offer.

[12] *Mary E. Woodard*, 57 ECAB 211 (2005).

[13] Federal (FECA) Procedure Manual, *supra* note 9 at Chapter 2.814.5(a)(5) (July 1996).

[14] An acceptable reason for refusal when a claimant is no longer on the agency's rolls is the employee has moved and a medical condition contraindicates return to the area of residence at the time of injury: *Id*. at Chapter 2.814.5(b)(3). In this case, appellant remained on the agency's rolls.

[15] *See* 5 U.S.C. § 8101(2). *See also James Robinson, Jr.*, 53 ECAB 417 (2002); *Vickey C. Randall*, 51 ECAB 357 (2000).

Dr. Hallock's July 20, 2009 report noted appellant's July 20, 2007 employment-related right shoulder injury and found that she could perform limited-duty work with restrictions. He did not address her ability to perform limited-duty work on December 19, 2008. The Board finds that Dr. Hallock's report is of limited probative value on the issue of suitable work.

Dr. Frankeny's July 20 and September 1, 2009 reports found that appellant could perform limited-duty work with the same restrictions previously provided. He did not change his prior opinion about the type of work she was capable of performing per day which served as a basis for the December 19, 2008 modified-duty job offer. The Board finds that Dr. Frankeny's reports are not sufficient to justify appellant's refusal of the position.

For these reasons, the Board finds that appellant did not support the refusal of suitable work solely because she did not wish to return to New Cumberland, Pennsylvania on December 19, 2008.

The Board further finds that Office procedures were properly followed in notifying appellant of the penalties for refusing an offer of suitable work. When appellant refused to accept the job offer, the Office notified her that her reasons for refusing the position were unacceptable and gave her an additional 15 days to accept the position or risk having her compensation benefits terminated. Thus, the Office acted within its discretion in finding that she refused an offer of suitable work and thereby terminated her compensation.

CONCLUSION

The Board finds that the Office properly terminated appellant's monetary compensation benefits effective May 15, 2009 for refusing an offer of suitable work pursuant to 5 U.S.C. § 8106(c).

ORDER

IT IS HEREBY ORDERED THAT the December 9, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 10, 2010
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