

FACTUAL HISTORY

This case has previously been before the Board. By decision dated April 19, 2002, the Board found that appellant was entitled to additional compensation for the period May 24 to August 30, 1999 because the medical evidence established that she could only work a 12-hour week during that period.¹ The facts and the law of the previous Board decision are incorporated herein by reference.²

While the case was on appeal before the Board, on January 7, 2002 Dr. Bruce E. Mathern, a Board-certified neurosurgeon, performed additional authorized lumbar spine surgery.³ Appellant stopped work and was placed on the periodic compensation rolls. By reports dated July 23, 2002 and February 24, 2004, Dr. Mathern noted appellant's complaint that she had increased back and leg pain. In reports dated from September 19, 2002 to March 11, 2004, Dr. Michael Decker, Board-certified in physical and pain medicine, advised that she had significant low back, hip and left leg pain and was totally disabled.

In May 2004, the Office referred appellant to Dr. Robert Adelaar, a Board-certified orthopedic surgeon, for a second opinion evaluation, and by report dated July 12, 2004, he provided examination findings, diagnosed a recurrent herniation at L4-5 and possible extruded disc at L5-S1. Dr. Adelaar advised that appellant could work sedentary to light duty for eight hours a day and provided restrictions to her physical activity. A June 15, 2005 magnetic resonance imaging (MRI) scan of the lumbar spine showed postoperative changes at L5-S1 with postoperative scar or fibrosis. Dr. Decker and Dr. Mathern continued to submit reports, noting appellant's complaints of continued radiating back pain, and Dr. Decker advised that she was totally disabled.

By report dated May 18, 2007, Dr. Decker provided physical examination findings and diagnosed low back pain, lumbar radiculitis and lumbar postlaminectomy syndrome. He advised that appellant's prognosis was guarded, that she could not return to work and recommended a functional capacity evaluation. A July 19, 2007 lumbar spine MRI scan study demonstrated post decompression and fusion changes at L4-S1 with no recurrence of disc herniation or spinal stenosis.

In October 2007, appellant was referred to Lori A. Cowan, a vocational rehabilitation specialist. A November 9, 2007 computerized tomography (CT) scan of the lumbar spine demonstrated postsurgical changes with no obvious herniated disc from L4 to S1 and degenerative disc disease from L3 to S1. A November 9, 2007 lumbar myelogram demonstrated

¹ Docket No. 01-1487 (issued April 19, 2002).

² Appellant, then a 39-year-old kinesiotherapist, sustained an employment-related lumbar sprain and herniated discs at L4-5 and L5-S1 on November 21, 1997 while assisting a patient. She underwent lumbar laminectomy on November 10, 1998 and returned to part-time sedentary duty on May 13, 1999. Shortly thereafter appellant began working three, four-hour days.

³ Appellant had the surgery in Richmond, Virginia. She stated that she was temporarily living with her parents in Ashland, Virginia but maintained residence in New Jersey.

mild bulging annuli at L2-3 and L3-4 with no extradural defects to suggest a herniated disc. A November 27, 2007 electrodiagnostic evaluation demonstrated evidence of left S1 radiculopathy.

In a February 6, 2008 report, Dr. Decker advised that appellant could return to limited duty on May 28, 2008 with restrictions that she sit for four hours a day; stand for two; reach above the shoulder and walk with a cane, push and pull 12 pounds for one hour; reach above the shoulder for one hour; perform simple grasping and keyboarding for eight hours daily; and lift 19 pounds from waist to shoulder intermittently. A functional capacity evaluation, performed on February 26, 2008, demonstrated that appellant could sit and stand for 30 minutes each episode, could occasionally walk, climb stairs and reach, with rare bending and no squatting, kneeling, stooping or crouching. Pushing was limited to 12 pounds and pulling to 15 pounds. In an August 1, 2008 work capacity evaluation, Dr. Decker reiterated his diagnoses and advised that appellant could work 8 hours a day with permanent restrictions, noting that she could sit and perform repetitive movements for 8 hours a day, reach for 2 hours, walk and stand for up to 1 hour, operate a vehicle for 1/2 hour daily, with no twisting, bending, stooping, pushing, pulling, lifting, squatting, kneeling or climbing and 10-minute breaks each hour, and on August 12, 2008 noted that appellant continued to complain of back and hip pain.

On August 18, 2008 the employing establishment forwarded a job offer for a corrective therapist in physical medicine to Dr. Decker for review. The employing establishment noted that it had searched for a position in Virginia within a 50-mile commuting radius and no position was available. The offered position was at two facilities in New Jersey, working several days at each. The position was within the restrictions provided by Dr. Decker. The duties were described as teaching and counseling patients and other staff members on exercise programs; evaluating and assessing ambulation training and providing assistive devices; assessing and providing orthotics and/or durable medical devices as needed; managing and completing travel consult requests; managing and providing diabetic food education sessions; closing out consults and delegating consults; managing, evaluating and assessing wheelchair needs of patients; making calls and appointments for the physical kinesiotherapy section; monitoring and supervising therapy sessions and providing feedback to patients; maintaining equipment including inventory; participating in various hospital committees on physical medicine and rehabilitative service representation assignments upon request; covering and managing various clinics for appointments and other clerical duties upon request. On August 20, 2008 Dr. Decker indicated by signature that the offered position was acceptable. By letter dated August 21, 2008, the employing establishment offered appellant the modified corrective therapist position in New Jersey, Monday through Friday, 8:00 a.m. to 4:30 p.m. The employing establishment noted that it was unable to offer appellant a position in Virginia and that Dr. Decker had approved the offer. Appellant was advised that she should report for work by September 15, 2008.

Appellant did not return to work, and by letter dated September 17, 2008, the Office advised her that the position offered was suitable. She 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,⁴ her right to compensation for wage loss or a schedule award would be terminated. Appellant was given 30 days to respond. In a second September 17,

⁴ 5 U.S.C. §§ 8101-8193.

2008 letter, she was informed that, as she had impeded rehabilitation efforts because she would not return telephone calls to her rehabilitation counselor, pursuant to section 8113(b) of the Act and section 10.519 of Office regulations, her monetary compensation would be reduced to zero. Appellant was given 30 days to respond.

On September 25, 2008 appellant, through her attorney, asked to change physicians, and by letter dated October 3, 2008, the Office informed her that she had not provided sufficient reasoning to support her request, and gave her 30 days to provide a written explanation of the request. In an October 20, 2008 letter, appellant stated that she felt that Dr. Decker was jeopardizing her quality of care and did not discuss a return to work with her. She reported that he was not kind and created a hostile environment toward her.

By letter dated November 6, 2008, appellant was given an additional 15 days to accept the offered position. On November 7, 2008 the Office informed her that it was unable to authorize a change of physicians at that time because the evidence supported that she was under the care of a qualified specialist and that her treatment had been appropriate. Appellant was informed that she could secure an examination at her own expense, and following review of the medical report, her request would be reassessed.

On November 20, 2008 the employing establishment confirmed that the offered position remained available, and in a decision dated November 21, 2008, the Office terminated appellant's compensation benefits, effective November 23, 2008, on the grounds that she refused an offer of suitable work. On November 25, 2008 appellant, through her attorney, requested a hearing, and on May 4, 2009, informed the Office that she had moved to Richmond, Virginia.

In reports dated November 18, 2008, March 17 and May 12, 2009, Dr. Durgada Basavaraj, a Board-certified neurologist, noted appellant's complaint of radiating back pain. He provided identical physical examination findings in all reports, advising that appellant had decreased lumbar range of motion, 5/5 strength in all muscle groups, and straight leg raising to 80 with pain on the left. Dr. Basavaraj diagnosed lumbar spondylosis with radiculopathy, failed back syndrome and chronic pain management, postoperative. He advised that appellant was permanently disabled with restrictions that she was unable to sit for more than 15 minutes, stand for 30 minutes, bend more than five times an hour, was unable to lift or carry 35 pounds or push and pull more than 50 pounds.

Appellant did not attend the hearing, held on May 18, 2009. Her attorney argued that the offered position was essentially appellant's regular position and was not suitable work, and that relocation expenses should have been offered. In a June 22, 2009 letter, the employing establishment noted that appellant was still on its employment rolls, that Dr. Decker had reviewed and approved the offered position, and that facilities in Virginia within a 50-mile commuting distance had been contacted but did not have an available position.

By decision dated July 24, 2009, an Office hearing representative affirmed the November 21, 2008 decision.

LEGAL PRECEDENT

Section 8106(c) of the 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.”⁵ 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.⁶ 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.⁷ To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.⁸ 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.⁹ 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.¹⁰ 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.¹¹

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.¹² It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.¹³

Office regulations provide that the employer, if possible, should offer suitable reemployment in the location where the employee currently resides. If this is not practical, the employer may offer suitable reemployment at the employee’s former duty station or other

⁵ 5 U.S.C. § 8106(c).

⁶ *Joyce M. Doll*, 53 ECAB 790 (2002).

⁷ 20 C.F.R. § 10.517(a).

⁸ *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff’d on recon.*, 43 ECAB 818 (1992).

⁹ 20 C.F.R. § 10.500(b); *see Ozone J. Hagan*, 55 ECAB 681 (2004).

¹⁰ 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).

¹¹ *Gloria G. Godfrey*, 52 ECAB 486 (2001).

¹² *Gayle Harris*, 52 ECAB 319 (2001).

¹³ *Richard P. Cortes*, 56 ECAB 200 (2004).

location.¹⁴ A preference for the area in which a claimant resides is not an acceptable reason for refusing an offered position.¹⁵

ANALYSIS

The Office terminated appellant's monetary compensation effective November 23, 2008 on the grounds that she refused an August 21, 2008 offer of suitable work. It found that the weight of the medical evidence established that the position was within her physical capabilities, based on the opinion of her attending physiatrist, Dr. Decker, a pain management specialist. Dr. Decker began treating appellant in September 2002 and on August 18, 2008 the employing establishment forwarded a copy of the job description of the offered position for his review. The position description fully described the duties and physical requirements of the offered position, and on August 20, 2008 Dr. Decker indicated by signature that the offered position was acceptable. While appellant asserted that Dr. Decker was jeopardizing her care, she submitted no evidence to show that his care was medically inappropriate. The Board therefore finds that, based on Dr. Decker's August 20, 2008 approval of the offered position, the position offered appellant on August 21, 2008 was suitable work within her physical capabilities.

Appellant's attorney argued on appeal that the medical evidence was conflicting and referenced a work capacity evaluation submitted by Dr. Decker on February 6, 2008 and an FCE performed on February 26, 2008. Appellant's wage-loss compensation was not terminated until November 23, 2008. While Dr. Decker provided restrictions in February 2008 not in conformance with the offered positions, he also provided a work capacity evaluation dated August 1, 2008 that was in conformance with the restrictions of the offered position, and on August 20, 2008 he clearly advised that appellant was physically capable of performing the position's job duties, and the FCE was performed nine months prior to the termination of appellant's wage-loss compensation.

Regarding appellant's argument that she could not drive from her home in Virginia to New Jersey, the site of the offered position, by letter dated June 22, 2009, the employing establishment advised that appellant was still on its employment rolls in New Jersey, and that facilities in Virginia within a 50-mile commuting distance had been contacted but did not have an available position. The record thus demonstrates that the employing establishment made reasonable efforts to accommodate appellant's return to work in the area of her residence at that time, Richmond, Virginia, but that there were no permanent jobs in that commuting area. The employing establishment then offered appellant a permanent position consistent with Dr. Decker's restrictions in New Jersey. The Board finds that appellant's preference for the area where she lived was not an acceptable reason for refusing suitable work, and the Office properly terminated appellant's monetary compensation due to his refusal of suitable work.¹⁶

¹⁴ 20 C.F.R. § 10.508; *Sharon L. Dean*, 56 ECAB 175 (2004).

¹⁵ *E.H.*, 60 ECAB ____ (Docket No. 08-1862, issued July 8, 2009).

¹⁶ *Id.* The Board notes that appellant did not permanently change her address to Richmond, Virginia until May 4, 2009, *see T.T.*, 58 ECAB 296 (2007), and that she was not entitled to relocation expenses because she had not been terminated from the employing establishment's employment rolls. *See* 20 C.F.R. § 10.508.

In order to properly terminate appellant's compensation under section 8106 of the Act, the Office must provide appellant notice of its finding that an offered position is suitable and give appellant an opportunity to accept or provide reasons for declining the position.¹⁷ The record in this case indicates that the Office properly followed the procedural requirements. By letter dated September 17, 2008, the Office advised appellant that the offered position was suitable. Appellant was notified that if she failed to report to work or failed to demonstrate that the failure was justified, her right to monetary compensation would be terminated, and she was allotted 30 days to either accept or provide reasons for refusing the position. On November 6, 2008 she was given an additional 15 days in which to respond. There is, therefore, no evidence of a procedural defect in this case as the Office provided appellant with proper notice. Appellant was offered a suitable position by the employing establishment and the offer was refused. Thus, under section 8106 of the Act, her monetary compensation was properly terminated effective November 23, 2008 on the grounds that she refused an offer of suitable work.¹⁸

After the Office established that the offered work is suitable, the burden shifted to appellant to show that her refusal was reasonable or justified.¹⁹ Appellant thereafter submitted reports dated November 18, 2008, March 17 and May 12, 2009, in which Dr. Basavaraj noted her complaint of radiating back pain and provided identical physical examination findings in all reports, and diagnosed lumbar spondylosis with radiculopathy, failed back syndrome and chronic pain management postoperative. Dr. Basavaraj advised that appellant was permanently disabled with restrictions that she was unable to sit for more than 15 minutes, stand for 30 minutes, bend more than five times an hour, was unable to lift or carry 35 pounds or push and pull more than 50 pounds. The Board, however, finds these reports insufficient to establish that the offered position was unsuitable because he did not provide any rationale for his opinion that appellant was permanently disabled or to explain why she could not perform the duties of the modified position.²⁰

An employee who refuses or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified.²¹ The Board finds that the Office properly terminated appellant's monetary compensation due to her refusal of suitable work and that she did not thereafter establish that her refusal of suitable work was justified.

CONCLUSION

The Board finds that the Office properly terminated appellant's wage-loss compensation pursuant to 5 U.S.C. § 8106(a).

¹⁷ See *Maggie L. Moore*, *supra* note 8.

¹⁸ *Joyce M. Doll*, *supra* note 6.

¹⁹ *M.S.*, 58 ECAB ____ (Docket No. 06-797, issued January 31, 2007).

²⁰ *S.S.*, 59 ECAB ____ (Docket No. 07-579, issued January 14, 2008).

²¹ 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the July 24, 2009 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: September 10, 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