United States Department of Labor
Employees' Compensation Appeals Board

T.L., Appellant	)	
and	)	**Docket No. 10-1649**
	)	**Issued: March 9, 2011**
U.S. POSTAL SERVICE, AIRPORT MAIL FACILITY, New York, NY, Employer	)	

Appearances:
Thomas S. Harkins, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 8, 2010 appellant filed a timely appeal from a December 17, 2009 merit decision of the Office of Workers' Compensation Programs. 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 found that appellant refused an offer of suitable work under 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On February 4, 2005 appellant, then a 41-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that she sustained neck and shoulder injuries from lifting mail on January 21, 2005. On July 12, 2005 the Office accepted the claim for cervical radiculopathy and left shoulder sprain/strain. Appellant received compensation for wage loss as of March 25, 2005.

The Office referred appellant for a second opinion evaluation by Dr. Surendrapal Mac, an orthopedic surgeon. In a report dated August 9, 2006, Dr. Mac provided results on examination

and found that her cervical and shoulder strains had resolved. He opined that appellant had cervical spondylosis, which he found more likely than not was aggravated by the work injury. In a supplemental report dated December 22, 2006, Dr. Mac stated that she had a permanent aggravation of cervical spondylosis from the work injury.

Appellant returned to work in a light-duty position on April 21, 2007. She filed a notice of recurrence of disability commencing May 7, 2007. The claim was accepted and appellant again received compensation for wage loss.

On October 12, 2007 the Office referred appellant, together with medical records and a statement of accepted facts, to Dr. P. Leo Varriale, an orthopedic surgeon. In a report dated November 19, 2007, Dr. Varriale reviewed a history of injury and results on examination. He noted that appellant had a history of neck pain since 1998. Dr. Varriale diagnosed resolved left shoulder and cervical strains, with preexisting cervical degenerative disc disease and no signs of cervical radiculopathy. He opined that appellant had recovered from the accepted employment-related conditions and could work with a five-pound lifting restriction due to the degenerative disc disease.

In a Form CA-20 report dated November 13, 2007, the attending physiatrist, Dr. Jean Claude Demetrius, advised that appellant remained totally disabled. Appellant also submitted a February 14, 2001 report from Dr. Joseph Gregorace, an osteopath, discussing a November 21, 1998 employment injury. The diagnoses included a traumatic C5-6 disc herniation.

The Office determined that a conflict in the medical opinion arose between Dr. Varriale and Dr. Demetrius. Appellant was referred to Dr. Sounder Eswar, a Board-certified orthopedic surgeon selected as a referee physician. In a report dated March 10, 2008, Dr. Eswar provided a review of appellant's history of lung and medical treatment with results on examination. He noted that appellant had sustained a lifting injury in November 1998. Dr. Eswar opined that she had an exacerbation of preexisting cervical radiculopathy on January 21, 2005. He stated:

> "In my opinion the [appellant] has recovered fully from the accepted condition of cervical radiculopathy and shoulder sprain from the incident at work on January 21, 2005. Some of the [her] symptoms are a continuation of her cervical degenerative dis[c] disease, which had been preexisting prior to the incident on January 21, 2005.
>
> "[Appellant] has recovered from the cervical sprain and degenerative dis[c] disease including a sprain of the shoulder. [Her] condition has stabilized and does not require any further medical treatment or tests. [Appellant] is not a candidate for surgery at this time. [She] can return to modified duties with minimal bending, twisting and lifting weights less than 20 [pounds]. [Appellant] can work [eight] hours per day with no significant difficulty."

Dr. Eswar concluded that appellant was likely to have symptoms from her well-established degenerative disc disease since 1998.

On July 21, 2008 the employing establishment offered appellant a light-duty mail handler position. The physical requirements stated that the job was limited to 20 pounds lifting with intermittent bending and twisting.

By letter dated July 31, 2008, the Office advised appellant that it found the offered position to be suitable employment. It cited the provisions of 5 U.S.C. § 8106 (c)(2) and advised that she had 30 days to either accept the position or provide reasons for refusing the offer.

On August 6, 2008 appellant submitted a June 27, 2008 report from Dr. Demetrius, who opined that she remained totally disabled. In a letter dated August 22, 2008, she stated that she needed more time to make a decision. The Office responded in a September 5, 2008 letter, finding that appellant had not offered a valid reason for refusing the position. Appellant was notified that she had 15 days to accept the position or her wage-loss compensation would be terminated.

By decision dated October 17, 2008, appellant's compensation was terminated on the grounds that she had refused an offer of suitable work.

In a letter dated October 8, 2009, appellant requested reconsideration of her claim. She argued that the Office should have expanded the accepted conditions in the case, consistent with Dr. Mac's opinion. Appellant argued that Dr. Varriale and Dr. Eswar had incomplete histories and Dr. Eswar failed to explain the term "minimal" with respect to bending and twisting.

By decision dated December 17, 2009, the Office reviewed the case on its merits and denied modification of the October 17, 2008 decision.

LEGAL PRECEDENT

5 U.S.C. § 8106(c) 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." 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.[1] To justify such a termination, it must show that the work offered was suitable.[2] 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.[3]

With respect to the procedural requirements of termination under section 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

[1] *Henry P. Gilmore*, 46 ECAB 709 (1995).

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

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

[4] *Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).

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]

It is well established that when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[6]

ANALYSIS

Appellant's claim was accepted for cervical radiculopathy and a left shoulder strain. The Office found a conflict in medical opinion under 5 U.S.C. § 8123 with respect to appellant's disability for work.[7] Dr. Demetrius, an attending physician, opined that appellant was totally disabled, while Dr. Varriale, a second opinion physician, found that appellant could work full time with restrictions. To resolve the conflict, appellant was referred to Dr. Eswar as an impartial referee physician.

Dr. Eswar reviewed the history of injury and medical treatment. He addressed findings of normal muscle strength with no sensory deficit of both shoulders or evidence of his impingement. The cervical spine revealed no muscle spasm or evidence of radiculopathy on compression testing. Dr. Eswar advised that appellant was extremely uncooperative on range of motion testing of the cervical spine but found no evidence of scoliosis.

Dr. Eswar provided a complete report with an opinion that the accepted employment-related conditions had resolved. He noted that appellant continued to have symptoms from her underlying degenerative cervical disc disease and he provided work restrictions of 20 pounds lifting with minimal bending and twisting. As noted, a well-rationalized opinion from a referee physician must be given special weight. The Board finds that Dr. Eswar's opinion represents the weight of the evidence with respect to appellant's work restrictions.

The employing establishment made appellant an offer of a light-duty position based on Dr. Eswar's work restrictions. The position was limited to 20 pounds lifting and intermittent bending and twisting. In accord with Office procedures, appellant was advised of the provisions of 5 U.S.C. § 8106(c)(2) and provided an opportunity to accept the provisions or provide reasons for refusing. She submitted a June 27, 2008 report from Dr. Demetrius, who reiterated his opinion that she remained totally disabled. Dr. Demetrius was one side of the conflict that was

[5] *Id.*

[6] *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

[7] The Federal Employees' Compensation Act provides that, if there is a 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 the examination. 5 U.S.C. § 8123(a). The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. 20 C.F.R. § 10.321 (1999).

resolved by Dr. Eswar and his report is not a valid reason for refusing the position.[8] Appellant did not offer any other specific reasons for refusing the offered job. The Office notified her reasons were not sufficient and provided her and additional 15 days to accept the position.

On reconsideration, appellant argued that the Office should have accepted a permanent aggravation of cervical spondylosis, based on Dr. Mac's opinion. The Board notes that Dr. Mac did not provide medical rationale in support of his opinion.[9] Moreover, in a suitable work determination, it is well established that the Office must consider preexisting and subsequently acquired medical conditions.[10] Dr. Eswar based his work restrictions on the underlying cervical degenerative disc disease. The physical requirements of the offered job were specifically based on the work restrictions provided by him, as they limited lifting to 20 pounds and limited bending and twisting. There is no probative evidence of record that the offered position was outside the established work restrictions.

The Board notes that on appeal, appellant does not offer any additional arguments. Appellant refers to the October 8, 2009 reconsideration request and the arguments offered. For the reasons noted above, the Board finds that the Office properly terminated her compensation on the grounds that she had refused an offer of suitable work.

CONCLUSION

The Board finds that the Office properly found that appellant had refused an offer of suitable work under 5 U.S.C. § 8106(c)(2).

[8] Additional reports from a physician on one side of the conflict that is properly resolved by a referee specialist are generally insufficient overcome the weight accorded the referee's report or create a new conflict. *See Harrison Combs, Jr.*, 45 ECAB 716 (1994); *Dorothy Sidwell*, 41 ECAB 857 (1990).

[9] Medical conclusions unsupported by rationale are of diminished probative value. *Jacquelyn L. Oliver*, 48 ECAB 232 (1996); *Ceferino L. Gonzales*, 32 ECAB 1591 (1981).

[10] *Richard P. Cortes*, 56 ECAB 200 (2004); *Janice S. Hodges*, 52 ECAB 379 (2001); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.4 (b)(4) (December 1993).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 17, 2009 is affirmed.

Issued: March 9, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board