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B.H., Appellant)	
)	
and)	Docket No. 11-379
)	Issued: October 17, 2011
DEPARTMENT OF THE AIR FORCE, ROBINS)	
AIR FORCE BASE, GA, Employer)	
)	

Case Submitted on the Record

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

On December 9, 2010 appellant filed a timely appeal of a November 17, 2010 Office of Workers' Compensation Programs' (OWCP) merit decision terminating her compensation benefits. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c)(1) and 501.3, the Board has jurisdiction to consider the merits of the case.

The issue is whether OWCP met its burden of proof to terminate appellant's compensation benefits on the grounds that she refused an offer of suitable work.

On appeal appellant alleged that the findings of Dr. Jeffrey Fried, a Board-certified orthopedic surgeon and second opinion physician, were vague.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 30, 1996 appellant, then a 41-year-old material handler, filed a traumatic injury claim alleging that she sprained a muscle in her low back lifting a wood crate weighing 90 pounds. On April 1, 1997 OWCP accepted her claim for low back strain. It later expanded appellant's claim to include L5-S1 radiculopathy. On February 27, 2004 Drs. Stephen Barnes, a Board-certified orthopedic surgeon, and George S. Stefanis, a Board-certified neurosurgeon, performed a decompressive hemilaminectomy L4-5 and L5-S1 facetectomy and foraminotomies L4-5 and L5-S1 as well as discectomy and interbody fusion L4-5 and L5-S1 and bilateral lateral fusion L4 to S1 and internal fixation using 3D internal fixation with cross link from L4 to S1. This surgery was approved by OWCP. In a report dated March 30, 2006, Dr. Stefanis recommended additional surgery for removal of hardware and possible repair of pseudoarthrosis. Appellant declined any additional surgery.

Appellant underwent a functional capacity evaluation on April 27, 2006. This testing revealed that she was capable of working in the medium capacity lifting 27 pounds occasionally. Appellant sought treatment from the Pain Institute of Georgia and on February 12, 2008 Dr. Julian M. Earls, a physician specializing in pain management, stated that appellant continued to experience residual back pain with radiation down the right leg and diagnosed lumbar postlaminectomy syndrome, lumbar radiculopathy with questionable pseudoarthrosis, lumbar degenerative disc disease and myofascial pain. Dr. Earls opined that appellant's accepted injury-related conditions were still present and disabling. He stated that appellant was totally disabled.

On September 15, 2008 OWCP referred appellant for a second opinion evaluation with Dr. Alexander N. Doman, a Board-certified orthopedic surgeon. In his October 9, 2008 report, Dr. Doman stated that nerve conduction velocity studies revealed very mild L5-S1 radiculopathy and mild polyneuropathy. On physical examination, he found obvious signs of symptom exaggeration with cog wheeling weakness in the right lower extremity and severe back pain with attempts to flex the right knee to degrees while in the prone position. Dr. Doman stated that appellant continued to suffer residuals of the work injury as a result of her lumbar spine fusion and that while she could not perform her duties as a material handler she could work eight hours a day in a sedentary capacity. He completed a work restriction evaluation and indicated that appellant could work eight hours a day with restrictions including no bending or stooping and pushing, pulling, lifting or squatting.

OWCP referred appellant for vocational rehabilitation counseling on December 4, 2008.

Dr. Earls completed a note on December 10, 2008 and stated that appellant's current drug routine was effective. He noted that Dr. Doman had released appellant to return to work and indicated that he disagreed with this assessment of appellant's abilities.

On May 5, 2009 the employing establishment offered appellant a light-duty position as a work order clerk within appellant's restrictions as established by Dr. Doman. Appellant responded and stated that she would try to perform the duties of the offered position. The employing establishment directed appellant to report to work on August 2, 2009.

Appellant submitted a work restriction evaluation from Dr. Earls indicating that she could sit, stand and walk intermittently for one hour. Dr. Earls also limited appellant's lifting to 10 pounds with no pushing and pulling. He also stated that appellant could not use her feet to operate controls for repetitive movement or operate material handling equipment. Dr. Earls indicated that appellant should avoid heat, cold, dampness, height, temperature changes, high speed working or exposure to dust, fumes or gases. He stated that appellant could not work.

Appellant submitted medical documentation regarding her additional condition of left shoulder and left knee pain which she attributed to exiting her vehicle in October 2006. On February 21, 2007 Dr. Stephen N. Barnes, a Board-certified orthopedic surgeon, diagnosed chronic impingement syndrome left shoulder and bilateral chondromalacia of the patella. In a note dated March 20, 2007, he expanded his diagnoses to include rotator cuff tear as demonstrated by MRI scan. Dr. Barnes also found a flexor ganglion tendon sheath of the right ring finger.

Dr. Earls completed a report on October 14, 2009 and attributed appellant's pain to lumbar postlaminectomy syndrome, lumbar radiculopathy, lumbar degenerative disc disease, lumbar facet arthropathy and overlying myofascial pain. He stated that appellant's pain persisted, but was stable on medications as long as she limited her activity.

OWCP referred appellant for an additional second opinion evaluation with Dr. Jeffrey Fried, a Board-certified orthopedic surgeon on November 9, 2009. In his December 14, 2009 report, Dr. Fried related appellant's history of injury and medical treatment. He examined her and found antalgic gait on the right, limited motion of the lumbar spine and 4/5 loss of strength in the right plantar flexors. Dr. Fried noted that appellant had no atrophy. He diagnosed lumbar radiculopathy and limited motion following a fusion with possible pseudoarthrosis or nonunion. Dr. Fried stated that appellant's back condition had not resolved, as demonstrated by pain and possible nonunion of the fusion. He opined that appellant was unable to perform her date-of-injury position and provided her limitations based on the 2006 functional capacity evaluation. Dr. Fried stated, "The claimant does have restrictions due to her work-related injury. [Appellant] had a functional capacities evaluation done which revealed the restrictions. In addition, she still has mild residual weakness in the right leg and limited motion in activities.... The limited bending and twisting would be secondary to loss of motion and the limited pushing, pulling and lifting would be due to the previous fusion with residual weakness. These restrictions are considered permanent." Dr. Fried completed a work capacity evaluation and opined that appellant could work eight hours a day with restrictions. He found that appellant could sit for six hours, kneel and climb for less than four hours and walk, stand, as well as push, pull and lift for two hours, reach, twist, bend and stoop for one hour and should not operate a motor vehicle or reach above the shoulder. Dr. Fried further indicated that appellant could push and pull up to 50 pounds and lift up to 20 pounds. He stated that appellant should not climb ladders.

On January 7, 2010 the employing establishment offered appellant a limited-duty position based on Dr. Fried's restrictions. It again offered appellant a position as work order clerk beginning January 11, 2010.

In a letter dated January 25, 2010, OWCP stated that the offered position was suitable work and allowed appellant 30 days to accept the position or offer her reasons for refusal. It

explained the penalty provisions of section 8106(c)(2) of FECA. Appellant submitted a report from Dr. Earls dated January 21, 2010, which stated that the offered position was not suitable. Dr. Earls stated:

“At this point in time, I can keep [appellant’s] pain under a reasonable amount of control as long as she has the freedom to limit her activity on an as needed basis. Although this position is primarily sedentary, with this patient’s lumbar pathology even sitting for a prolonged period of time will exacerbate her pain considerably. This exacerbation will undoubtedly lead to poor concentration and diminished productivity. In addition, [appellant] has to be in the position where she can lay down when she needs to for as long as she needs to and able to function. From the description, it appears that her major duties and responsibilities are quite extensive and I seriously doubt that her physical limitations and her pain level would allow her to be productive within that position. It is also my opinion that to send [appellant] to this position would be a set up for poor performance, pain exacerbation, missed days and eventual job termination.”

In a letter dated March 4, 2010, OWCP stated that Dr. Earls’ report was purely speculative and not a basis for finding the job offer unsuitable. It allowed appellant 15 days to accept the position and stated that no further reasons for refusal would be considered.

By decision dated March 24, 2010, OWCP found that appellant had refused an offer of suitable work and terminated her wage loss and schedule award compensation benefits. Counsel requested an oral hearing on April 6, 2010. He appeared at the oral hearing on August 23, 2010 and argued that OWCP failed to properly address additional conditions, that Dr. Earls’ report was not appropriately considered and that there was an existing conflict of medical opinion evidence.

Dr. Earls submitted treatment notes diagnosing lumbar postlaminectomy syndrome, lumbar radiculopathy, lumbar degenerative disc disease and lumbar facet arthropathy.

By decision dated November 17, 2010, OWCP’s hearing representative found the weight of the medical opinion evidence rested with Dr. Fried and established that appellant was able to work with restrictions. The hearing representative further found additional development of the medical conditions alleged by appellant should be undertaken by OWCP.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation, including cases in which OWCP terminates compensation under section 8106(c) for refusal to accept suitable work.²

Section 8106(c)(2) of FECA provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee is not

² *Sandra K. Cummings*, 54 ECAB 493 (2003).

entitled to compensation.³ Section 10.517(a) of the implementing federal regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured for her has the burden to show that the refusal or failure to work was reasonable or justified.⁴ After providing the notices described in section 10.516, OWCP will terminate the employee's entitlement to further compensation.⁵ However, the employee remains entitled to medical benefits as provided by section 8103 or as justified. To support termination, OWCP must show that the work offered was suitable,⁶ and must inform appellant of the consequences of refusal to accept such employment.⁷

The determination of whether an employee is capable of performing modified duty is a medical question that must be resolved by probative medical opinion.⁸ It is well established under OWCP's procedures that, if the medical evidence documents a condition which has arisen since the compensable injury and the condition disables the employee, the job will be considered unsuitable.⁹

ANALYSIS

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's compensation benefits due to an existing conflict of medical opinion evidence. Appellant's attending physician, Dr. Earls, repeatedly opined that appellant could not work due to residuals of her accepted back injury and surgery. He completed a form report listing appellant's restrictions and specifically addressed the aspects of the offered position which he felt were inappropriate. OWCP referred appellant for second opinion evaluations with Drs. Doman and Fried, both of whom opined that appellant could return to sedentary work with varying restrictions. The employing establishment offered appellant a light-duty position based on the work restrictions from Dr. Fried which OWCP found was suitable. The Board finds that there is a conflict of medical opinion evidence in the record regarding the extent of appellant's disability which OWCP failed to resolve prior to determining that the offered position was suitable. The

³ 5 U.S.C. § 8106(c)(2).

⁴ 20 C.F.R. § 10.517(a).

⁵ *Id.* at § 10.516. This section provides that OWCP shall advise the employee that it has found the offered work to be suitable and afforded the employee 30 days to accept the job or present any reasons to counter OWCP's finding of suitability. If the employee present such reasons, and OWCP determines that the reasons are unacceptable, it will notify the employee of that determination and that he or she has 15 day s in which to accept the offered work without penalty. At that point in time, OWCP notification need not state the reason for finding that the employee's reasons are not acceptable.

⁶ See *Carl W. Putzier*, 37 ECAB 691 (1986); *Herbert R. Oldham*, 35 ECAB 339 (1983).

⁷ See *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(d)(1) (July 1997).

⁸ See *Gloria J. Godfrey*, 52 ECAB 486 (2001); *Robert Dickerson*, 46 ECAB 1002 (1995).

⁹ *Id.* See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (July 1997).

Board finds that the reports of Drs. Doman and Fried are not sufficient to outweigh the reports of Dr. Earls as OWCP's physicians did not have agreement on the extent of appellant's disability and did not specifically address the concerns raised by Dr. Earls. However, when there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which 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 and resolve the conflict of medical evidence.¹⁰ This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹¹ As OWCP failed to comply with the requirements of FECA prior to terminating appellant's compensation benefits on the basis that she refused a suitable work position, the Board finds that OWCP failed to meet its burden of proof to terminate appellant's compensation benefits and the November 17, 2010 decision of OWCP must be reversed.

CONCLUSION

The Board finds that the November 17, 2010 decision of OWCP must be reversed due to an existing unresolved conflict of medical opinion evidence.

¹⁰ 5 U.S.C. §§ 8101-8193, 8123; *B.C.*, 58 ECAB 111 (2006); *M.S.*, 58 ECAB 328 (2007).

¹¹ *R.C.*, 58 ECAB 238 (2006).

ORDER

IT IS HEREBY ORDERED THAT the November 17, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 17, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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