

FACTUAL HISTORY

On August 16, 1988 appellant, then a 32-year-old nursing assistant, sustained a low back injury in the performance of duty while making beds in the morning. OWCP accepted her claim for low back strain. It later accepted a herniated disc at L5-S1, lumbar disc disease with myelopathy and joint biopsy. Appellant received compensation for temporary total disability on the periodic rolls.

On March 30, 2009 Dr. Joel A. Saperstein, a Board-certified orthopedic surgeon and OWCP referral physician, found that appellant continued to experience significant pain, requiring medical treatment, causally related to her employment injury. He found that the extent of her disability from an objective point of view was that she was incapable of returning to her preinjury position as a nursing assistant.

Dr. Saperstein found that appellant's treatment had been inadequate. He explained that after a full evaluation by her operating physician, pain management physician and most importantly a psychiatric physician and after appropriate physical therapeutic modalities, appellant should be offered an attempt at sedentary, administrative or clerical work "and see how she does." Dr. Saperstein found appellant capable of attempting to work from two to four hours a day "but prior to that she needs behavioral approach [as] such a long period of time has gone on with chronic pain and that there is a significant emotional imprint that can only be handled from a psychiatric point of view."

Dr. Saperstein completed a work capacity evaluation finding that appellant could work three hours a day with restrictions. When asked what other factors needed to be considered in identifying a position for appellant, he advised: "needs complete evaluation by psychiatrist, operating back surgeon and pain management -- needs their opinion and prognosis."

OWCP advised the employing establishment on December 11, 2009 that it determined that the weight of the medical evidence rested with Dr. Saperstein's opinion and provided a copy of his report and work restrictions.

On February 12, 2010 the employing establishment offered appellant a limited-duty job as a nursing assistant (patient safety sitter) in Brockton, Massachusetts.² It noted the duties adhered to the physical limitations set forth by Dr. Saperstein.

On March 10, 2010 appellant declined the job offer for two reasons. Her medications and limited ability did not allow her the capability of being in charge of anyone. Appellant also advised that on or about April 15, 2010 she would be moving to Tucson, Arizona, and would soon be notifying OWCP with the date and address.

OWCP found the offered position suitable and currently available. It gave appellant 30 days to accept or explain her refusal.

² The Brockton Medical Center is about 20 miles from the employing establishment.

On March 30, 2010 appellant notified OWCP of her new address in Tucson, Arizona, effective April 23, 2010.

On April 21, 2010 OWCP found that appellant did not provide a valid reason for refusing the offered position: “It appears that you are relocating voluntarily and not due to your work[-]related medical condition.” OWCP gave appellant an additional 15 days to accept and arrange for a report date or face termination of her compensation.

In a decision dated May 6, 2010, OWCP terminated appellant’s compensation for refusing suitable work.

Appellant submitted proof of a purchase agreement for a home in Tucson, Arizona, in the fall of 2009, prior to the employer’s February 12, 2010 offer of employment in Brockton.

On December 28, 2010 OWCP’s hearing representative affirmed the termination of appellant’s compensation. The hearing representative found that Dr. Saperstein’s opinion established that appellant was capable of performing sedentary work. The hearing representative further found that the employing establishment properly offered appellant a position in her residential area: “While the claimant subsequently moved out of state and has alleged this was a valid reason for refusal of the job offer, the evidence of record fails to support that the claimant’s move to Arizona was in any way a necessity.” Although appellant indicated that her plans to move predated the job offer, the record established that she was advised before her move that OWCP had determined the job to be suitable.

In a decision dated July 18, 2011, OWCP reviewed the merits of appellant’s claim and denied modification of its prior decision.³

LEGAL PRECEDENT

Section 8106(c)(2) of FECA states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for her is not entitled to compensation.⁴ OWCP has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be terminated, however, OWCP has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee’s ability to work and has the burden of establishing that a position has been offered within the employee’s work restrictions, setting forth the specific job requirements of the position.⁵ In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2),

³ Although OWCP concluded at the end of its decision that appellant was not entitled to a merit review of the December 28, 2010 decision, OWCP addressed the merits of her reasons for refusing the job offer, finding that not accepting a position because she moved to Arizona was not an acceptable reason for refusal, and that her willingness to work in Arizona was at odds with her earlier position that she could not do the job.

⁴ 5 U.S.C. § 8106(c)(2).

⁵ *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

which is a penalty provision, OWCP has the burden of showing that the work offered to and refused or neglected by appellant was suitable.⁶

ANALYSIS

OWCP found that the opinion of Dr. Saperstein, the second-opinion orthopedic surgeon, represented the weight of the medical evidence on appellant's employment-related disability. Dr. Saperstein did not release appellant to limited duty unconditionally. He qualified his opinion that she could attempt a sedentary, administrative or clerical position for two to four hours a day, but made clear that she should first be evaluated by her operating physician, pain management physician and, most importantly, a psychiatric physician. Even in his work capacity evaluation, Dr. Saperstein stated that a complete evaluation by a psychiatrist, the operating back surgeon and a pain management physician was needed to identify a position for her. He stated that appellant "needs their opinion and prognosis."

There is no medical evidence in the record that such evaluations ever took place. Rather, the employing establishment made a job offer from the physical limitations Dr. Saperstein provided without regards to the evaluations he considered a condition precedent. The employing establishment based its job offer on only a part of Dr. Saperstein's report. The report taken as a whole, however, did not support an immediate offer, nor did OWCP ask Dr. Saperstein whether he approved the offered position.

The Board finds that Dr. Saperstein's opinion did not establish that the employing establishment's February 12, 2010 offer was suitable. Dr. Saperstein found that appellant continued to experience significant pain causally related to her employment injury. He found that she required medical treatment for this residual pain. Dr. Saperstein found that the extent of appellant's disability from an objective point of view was that she was incapable of returning to her preinjury position as a nursing assistant. He found that she needed a complete evaluation by several specialists before she could attempt to return to work.

As OWCP did not meet its burden of showing that the work offered to appellant was suitable, the Board will reverse the termination of her compensation under 5 U.S.C. § 8106(c)(2). The Board will remand the case for reinstatement of compensation retroactive to the effective date of termination.

CONCLUSION

The Board finds that OWCP improperly terminated appellant's compensation on the grounds that she refused suitable work.

⁶ *Glen L. Sinclair*, 36 ECAB 664 (1985).

ORDER

IT IS HEREBY ORDERED THAT the July 18, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 9, 2012
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