United States Department of Labor
Employees' Compensation Appeals Board

H.Y., Appellant	)	
and	)	**Docket No. 12-1969**
	)	**Issued: February 26, 2013**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Kearny, NJ, Employer	)	

Appearances:
Norman McNulty, Jr., Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 27, 2012 appellant, through her representative, filed a timely appeal from a July 11, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 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 OWCP properly terminated appellant's wage-loss benefits under 5 U.S.C. § 8106(c) on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On October 12, 2005 appellant, then a 56-year-old mail processing clerk, filed an occupational claim (Form CA-2) alleging that she sustained cervical radiculopathy, cervical disc

[1] 5 U.S.C. § 8101 *et seq.*

herniations and bilateral carpal tunnel syndrome as a result of her federal employment. She noted that her job involved working a letter sorting machine and carrying trays of mail. On November 16, 2005 OWCP accepted the claim for bilateral carpal tunnel syndrome and brachial neuritis/radiculitis.

Appellant returned to a light-duty position, stopped working on June 16, 2008 and filed a claim for recurrence of disability. A second opinion physician, Dr. Jeffrey Lakin, a Board-certified orthopedic surgeon, opined in an October 21, 2008 report that appellant's current diagnosis of cervical radiculopathy was causally related to her federal employment. By decision dated July 24, 2009, an OWCP hearing representative found that cervical radiculitis should be accepted as employment related and appellant had established a recurrence of total disability.

On August 29, 2009 the employing establishment offered appellant a modified clerk position.

The record indicates that on September 18, 2009 OWCP accepted the claim for cervical radiculitis. In a duty status report (Form CA-17) dated October 21, 2009, appellant's attending physician, Dr. Hong Pak, a physiatrist, advised that she was limited to five pounds lifting, seven hours sitting and four hours pushing and pulling.

By letter dated November 17, 2009, OWCP notified appellant that it found the offered position suitable. In a memorandum of telephone call dated November 24, 2009, appellant stated her concern about the lifting required in the offered job. OWCP stated that it would seek clarification. On November 27, 2009 it prepared a statement of accepted facts (SOAF), listing the claim was accepted for bilateral carpal tunnel syndrome and brachial radiculitis, without mention of cervical radiculitis.

OWCP referred appellant to Dr. Lakin and to Dr. Catherine Mazzola, a neurosurgeon, for second opinion examinations. Drs. Lakin and Mazzola were asked to provide opinions as to the employment-related conditions, disability and work capacity.

In a report dated December 22, 2009, Dr. Lakin reviewed a history of injury and medical treatment. He stated that appellant's current diagnoses appeared to be degenerative disc disease and cervical radiculitis, noting the cervical radiculitis appeared to be work related. In response to a question as to whether the accepted carpal tunnel syndrome and brachial radiculitis were still active, Dr. Lakin opined that the conditions appeared to be no longer active. He stated that appellant could return to full duty as there was no evidence of work-related injuries. In response to a question as to maximum medical improvement, Dr. Lakin stated that, as far as appellant's complaints to the cervical spine radiculitis, there were no signs of active radiculitis or brachial radiculitis.

The Board notes that Dr. Pak, the attending physician, submitted CA-17 reports dated November 25, 2009 to February 25, 2010. The reports provided the same work restrictions as in the October 21, 2009 Form CA-17 (five pounds lifting, seven hours sitting, four hours pushing and pulling).

In a report dated March 2, 2010, the second opinion neurosurgeon, Dr. Mazzola, provided results on examination.[2] She opined that appellant did have clear evidence, both radiologically and electrodiagnostically, of bilateral carpal tunnel syndrome and at least a C6 radiculopathy on the right side. Although the accepted conditions were bilateral carpal tunnel syndrome and brachial radiculitis, this was "not correct" and the diagnosis was bilateral carpal tunnel syndrome and cervical radiculopathy with C4-5 and C5-6 disc herniations. Dr. Mazzola stated that the symptomology experienced by appellant was likely accelerated or at least aggravated by the work performed. She recommended that appellant have surgery. Dr. Mazzola opined that appellant "probably could return to work with limited duty. However, any kind of significant movement or hand movement will only aggravate her symptoms. Light desk duty would probably be the optimal job for this claimant." On a work capacity evaluation form (OWCP 5c), Dr. Mazzola stated that appellant "could not work due to pain," and indicated she could do telephone work and desk work, but not mail sorting.

On April 5, 2010 the employing establishment offered appellant a modified clerk position. The job requirements included sorting flats and mail, with a five-pound lifting restriction. The employing establishment indicated that the physical restrictions were within the reported restrictions of Dr. Pak on February 25, 2010.

By letter dated April 27, 2010, OWCP advised appellant that it found the offered position to be suitable. It stated that she had 30 days to accept the position or provide reasons for refusing. On May 20, 2010 appellant submitted a May 3, 2010 report from Dr. Pak, who stated that he had reviewed the modified job offer. Dr. Pak noted that he had considered appellant's mental and physical condition, including insomnia, and stated that "based upon my professional expertise and findings, the presented duties would exacerbate [appellant's] health problems and so are not suitable." He noted that Dr. Lakin had found permanent restrictions in his October 21, 2008 report and appellant should be offered her previous light-duty job with a high back support chair.

In a letter dated June 22, 2010, OWCP advised appellant that it found her reasons for refusing the position unacceptable. It stated that she had 15 days to accept the position. The record indicates that OWCP did not take action with respect to the June 22, 2010 letter after 15 days. Dr. Pak continued to submit duty status reports with the previously listed work restrictions. In a Form CA-110 dated January 6, 2011, OWCP reported that, according to the employing establishment, the light-duty job was still available.

By decision dated February 8, 2011, OWCP terminated appellant's entitlement to wage loss effective February 12, 2011 on the grounds that she had refused an offer of suitable work.

Appellant requested a review of the written record by an OWCP hearing representative.

By decision dated May 16, 2011, the hearing representative affirmed the termination of compensation. The hearing representative found the job offer was within the restrictions of Dr. Pak and his opinion as to a possible future injury was of diminished probative value.

[2] The report of record appears to be incomplete and is missing the initial pages of the report.

Appellant, through her representative, requested reconsideration by letter dated April 9, 2012. The representative argued that OWCP failed to consider the medical evidence of record and/or to establish that the job was suitable.

By decision dated July 11, 2012, OWCP reviewed the case on its merits and denied modification.

LEGAL PRECEDENT

Section 8106(c) of FECA 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 OWCP's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[3] To justify such a termination, OWCP must show that the work offered was suitable.[4] The determination of whether an employee is physically capable of performing the job is a medical question that must be resolved by medical evidence.[5]

With respect to the procedural requirements of termination under section 8106(c), the Board has held that OWCP must inform appellant of the consequences of refusal to accept suitable work, and allow appellant an opportunity to provide reasons for refusing the offered position.[6] If appellant presents reasons for refusing the offered position, OWCP must inform the employee if it finds the reasons inadequate to justify the refusal of the offered position and afford appellant a final opportunity to accept the position.[7]

ANALYSIS

In the present case, OWCP found that the modified clerk position, initially offered to appellant on April 5, 2010, was medically suitable, but a review of the medical evidence in this case indicates that OWCP did not properly develop the evidence in accord with established principles.

The employing establishment stated that the April 5, 2010 modified clerk position was within the February 25, 2010 work restrictions provided by Dr. Pak, the attending physician. The Board notes that Dr. Pak submitted a May 3, 2010 report stating that he did not find the offered position to be suitable. According to the hearing representative, Dr. Pak merely noted that appellant might be subject to future injury if she took the position.[8] OWCP never sought

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

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

[5] *Id.*

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

[7] *Id.*

[8] The possibility of a future injury does not constitute an injury under FECA and therefore no compensation can be paid for such a possibility. *Gaetan F. Valenza*, 39 ECAB 1349, 1356 (1988).

clarification from Dr. Pak to determine if his opinion as to suitability was based only on a fear of a future injury.

The initial job offer of August 29, 2009 was made prior to the acceptance of cervical radiculitis on September 18, 2009. Prior to February 25, 2010, OWCP had determined that the medical evidence required further development with respect to appellant's work restrictions. It attempted to further develop the evidence by referring appellant to Dr. Lakin and Dr. Mazzola.

Once OWCP undertakes to develop the medical evidence on the issue, it has the responsibility to properly develop the evidence.[9] It is well established that, when OWCP further develops the evidence and sends the claimant for a second opinion evaluation, it has an obligation to secure probative medical opinion addressing the issue presented.[10] The Board notes that the November 27, 2009 SOAF was deficient as it did not properly state that cervical radiculitis was an accepted condition.[11] In addition, OWCP failed to properly develop the evidence received from Dr. Mazzola, the second opinion neurosurgeon. There are initial pages missing from her report, with no indication that a complete report was sought. Those of record clearly do not support that the offered position was suitable. Dr. Mazzola found continuing diagnosed conditions and opined that appellant could not perform mail sorting, recommending more sedentary employment. OWCP did not request a supplemental opinion.

The delay from the letter finding the job suitable on April 27, 2010 to the issuance of the February 8, 2011 decision did not eliminate the need to secure probative medical evidence from the second opinion physicians. OWCP should have secured medical evidence that properly determined appellant's work restrictions and provided the basis for evaluating the suitability of the offered position.[12] The Board finds the medical evidence of record does not establish that the offered position was medically suitable.

CONCLUSION

The Board finds OWCP did not properly terminate appellant's compensation under 5 U.S.C. § 8106(c) on the grounds that she had refused an offer of suitable work.

[9] *Melvin James*, 55 ECAB 406 (2004); *see also C.H.*, Docket No. 12-1109 (issued December 14, 2012).

[10] *Peter C. Belkind*, 56 ECAB 580 (2005).

[11] *See P.P.*, Docket No. 12-970 (issued November 6, 2012).

[12] It is well established that, with respect to a suitable work termination, OWCP must consider preexisting and subsequently acquired medical conditions, as well as employment-related conditions. *Richard P. Cortes*, 56 ECAB 200 (2004); *Janice S. Hodges*, 52 ECAB 379 (2001).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 11, 2012 is reversed.

Issued: February 26, 2013
Washington, DC

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

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

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