U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RHONDA E. FERGUSON and U.S. POSTAL SERVICE,
POST OFFICE, Kansas City, KS

*Docket No. 02-1629; Submitted on the Record;*
*Issued March 3, 2003*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the grounds that she refused suitable work pursuant to 5 U.S.C. § 8106(c).

On May 27, 1997 appellant, then a 37-year-old flat sorting machine (FSM) distribution clerk, filed a traumatic injury claim alleging that on May 24, 1997 she injured her back and neck while lifting a tub of mail in the performance of duty. Appellant stopped work on May 27, 1997. The Office accepted the claim for cervical strain, lumbosacral strain, herniated nucleus pulposus at L5-S1 and authorized a surgical procedure for anterior body cage fusion at L5-S1, performed by her attending physician, Dr. Glenn Amundson, a Board-certified orthopedic surgeon. She received medical treatment by various physicians and appropriate compensation for lost time at work.

Following the fusion procedure, Dr. Amundson reported that the surgery was satisfactory however appellant continued to suffer low back pain (LBP); therefore, he recommended physical rehabilitation. He indicated in a work capacity evaluation and report dated November 4, 1999 that appellant was restricted to pushing and pulling no more than 10 pounds and no lifting. Dr. Amundson did not indicate that appellant could return to work at that time.

The Office referred appellant to Dr. James Armstrong, a Board-certified orthopedic surgeon, for a second opinion. In a December 3, 1999 report, Dr. Armstrong found that appellant could return to work during morning hours under his restrictions of 10 pounds of pushing and pulling and his additional restriction of lifting no greater than 10 pounds in a 15-minute period for each hour of work. The Office provided Dr. Amundson the report from Dr. Armstrong on February 29, 2000 and requested that he provide an opinion as to whether appellant could return to limited-duty work. Dr. Amundson responded on March 14, 2000 that appellant could return to four hours per day of limited-duty work and then gradually increase to eight hours per day.

The employing establishment thereafter furnished Dr. Amundson a copy of a modified job description within the restrictions outlined in Dr. Armstrong's December 3, 1999 report and requested his opinion regarding suitability. Dr. Amundson responded on April 6, 2000 that appellant could work within the restrictions outlined by him and further that the position proposed by the employing establishment was medically appropriate for appellant.

In a letter dated April 13, 2000, the employing establishment offered appellant the position of modified FSM operator, which complied with the restrictions outlined above. Also, in a letter dated April 13, 2000, the Office advised appellant that the job offered by the employing establishment was suitable and that Dr. Amundson had approved the offer. The Office indicated that appellant had 30 days to accept the position or provide explanation of the reasons for refusing it and advised that any claimant that refused suitable employment would not be entitled further compensation or a schedule award.

Appellant refused the offer in documentation received April 24, 2000 and stated that her refusal stood pending her medical release back to work. She indicated that she had no medical evidence from her physician indicating that she could return to work. Appellant requested a copy of Dr. Amundson's release to work from the Office.

The Office furnished appellant with a copy of Dr. Amundson's approval of the job offer, and the description of the modified position, which contained a signature line allowing appellant the opportunity to accept or refuse the job offer. On May 17, 2000 the employing establishment advised the Office that the job was still available and the Office notified appellant that her reasons for refusing the offer of suitable work were unacceptable. Appellant was given an additional 15 days to accept the job offer and advised that otherwise her compensation would be terminated. She failed to accept the offer within the allotted timeframe.

By decision dated August 4, 2000, the Office terminated appellant's entitlement for all future compensation on the grounds that she refused an offer of suitable work. On August 28, 2000 appellant requested an oral hearing and submitted additional evidence.

Appellant subsequently submitted several documents, including an August 31, 2000 arbitration decision and a new report from Dr. Amundson dated August 30, 2000. The arbitration decision reflected that appellant filed a grievance following removal from her position with the employing establishment effective November 6, 2000 for failure to accept the offer of suitable limited duty and being absent without leave (AWOL). The arbitrator concluded that appellant was removed from her position without just cause because she had not been medically cleared for work when the position was offered to her until August 2000.

The August 30, 2000 report from Dr. Amundson indicated that appellant underwent a recent functional capacity evaluation on August 21, 2000, which showed that she was at a less than sedentary physical demand level. The evaluation indicated restrictions of part-time work with lifting of no more than five pounds, occasional sitting and standing, no walking or

crouching-type maneuvers and occasional overhead reaching, repetitive squatting and kneeling. Dr. Amundson further stated:

> "With respect to return to work, a series of job descriptions had been forwarded … that reflected a sedentary or less than sedentary work ability and these were felt, after seeing Dr. Armstrong, that she could return to four hours of limited activity in the morning at a sedentary or less than sedentary work level. We supported this level of entry work return. However, we had never been able to evaluate the patient to return her to work. During my transition … to my private practice … the patient was lost to follow-up for a two-month period. It was during this period that I received correspondence for a job level. The job level was felt hypothetically appropriate, but again, I was never able to express or discuss this with the patient…. I therefore feel that her future care would be best returned to work at levels indicated by the functional capacity evaluation testing and possible consideration of a pain clinic…."

Following the hearing held January 30, 2002, an Office hearing representative affirmed the prior decision in a decision dated April 23, 2002. The Office found that the offered position was medically and vocationally suitable for appellant and that, since the Office adhered to all procedural requirements in making the job offer, the Office properly terminated appellant's entitlement to compensation.

The Board finds that the Office properly terminated appellant's compensation effective August 4, 2000 on the grounds that she refused suitable work pursuant to 5 U.S.C. § 8106(c).

It is well settled that, once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[1] This includes cases in which the Office terminates compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee under section 8106(c)(2).[2] The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment and, for this reason, will be narrowly construed.[3] The issue 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 the medical evidence.[4]

The Board has stated that the weight of the medical evidence is determined by its reliability, its probative value and its convincing quality. The opportunity for and thoroughness of examination, the accuracy and completeness of the doctor's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of

[1] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[2] *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987); *Herman L. Anderson*, 36 ECAB 235 (1984).

[3] *Stephen R. Lubin*, 43 ECAB 564 (1992).

[4] *See John E. Lemker*, 45 ECAB 258 (1993); *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

the doctor's opinion are factors which enter into such evaluation.[5] In terminating appellant's compensation, the Office relied on the opinions of Dr. Armstrong, the second opinion physician, and Dr. Amundson, appellant's attending physician, in reports dated December 3, 1999 and March 14 and April 6, 2000.

The physical requirements of the offered modified FSM operator position included: working 4 hours per day in the morning with sitting up to 20 minutes at a time, up to 1½ hours per day, walking up to 10 minutes up to 1½ hours per day, no lifting greater than 10 pounds in a 15-minute period during each hour of work, squatting, kneeling and twisting only on rare occasions and standing intermittently for 15 to 20 minutes up to 1½ hours per day. In reports dated March 14 and April 6, 2000, Dr. Amundson indicated that appellant's fusion was satisfactory and that she was able to resume light-duty work. He reviewed Dr. Armstrong's December 3, 1999 report and the offered job description and agreed that appellant should be restricted to 4 morning hours per day with restrictions of 10 pounds of pushing and pulling and 10 pounds of lifting in a 15-minute period for each hour worked. The Office established that the offered position of modified FSM operator was suitable.

The physical requirements of the offered position of modified FSM operator comply with the physical restrictions set forth by Dr. Armstrong and appellant's treating physician, Dr. Amundson. The Board finds that the Office complied with its procedural requirements in advising appellant that the position was found suitable and providing her with the opportunity to accept the position or provide her reasons for refusing.[6] The record reflects that appellant did respond to the Office's notice in documentation received by the Office on April 24, 2000, where she indicated that Dr. Amundson had not released her for work. However, this evidence was insufficient to show that the offered position was not medically suitable. Therefore, appellant failed to submit any evidence or argument to show that the offered position was not medically suitable.[7]

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 the medical evidence.[8] In this case, the medical evidence provided from Dr. Amundson, appellant's attending physician, establishes the suitability of the offered position. The Office met its burden of proof to terminate appellant's compensation based on her refusal of suitable work. Thereafter, the burden shifted to appellant to establish that the refusal of the job offer was justified.[9]

Following the termination of her compensation benefits, the burden of proof shifted back to appellant to support her claim of employment-related continuing disability with probative

[5] *Melvina Jackson*, 38 ECAB 43 (1987); *Naomi A. Lilly*, 10 ECAB 560 (1959).

[6] *See Bruce Sanborn*, 49 ECAB 176 (1997).

[7] *See Stephen R. Lubin, supra* note 3.

[8] *See Maurissa Mack*, 50 ECAB 498 (1999); *Robert Dickerson*, 46 ECAB 1002 (1995).

[9] *See Deborah Hancock*, 49 ECAB 606 (1998); *Henry P. Gilmore*, 46 ECAB 709 (1995).

medical evidence.[10] The medical evidence required to establish a causal relationship, generally, is rationalized medical evidence. Rationalized medical evidence is medical evidence, which includes a physician's opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[11]

Following the Office's August 4, 2000 decision, appellant submitted various documents including a report from Dr. Amundson dated August 30, 2000. Dr. Amundson noted that appellant had a recent functional capacity evaluation performed August 21, 2000 which indicated that she was only able to work on a part-time basis with no walking and a lifting capacity of 4 pounds instead of 10. He indicated that he did in fact approve appellant's return to work in March 2000 however he did so without a follow-up examination and discussion with appellant. Dr. Amundson indicated in his August 30, 2000 report that the August 21, 2000 evaluation more accurately reflected appellant's capability to return to work and appellant based her claim that the Office improperly terminated benefits in part on his August 2000 report. The Board finds that this report is insufficient to establish that the position offered appellant was unsuitable as the physician offered no diagnosis or explanation of how or why appellant's condition prevented her from performing the job duties of the selected position at the time it was offered. This evidence does not establish that Dr. Amundson changed his opinion as to the suitability of the modified position offered to appellant prior to the Office's termination of benefits, but merely refined her current limitations. His opinion, however, while supportive that appellant has limited capabilities, does not explain how appellant's condition and residuals prevented her return to work in the modified position in March 2000 when the Office notified him of the offered position and its finding that it was suitable. Nor did Dr. Amundson retract his prior reports indicating his approval of the offered position. This evidence does not establish that appellant is disabled from work in any way.

Appellant further submitted in support of her contention that the Office improperly terminated benefits, a grievance arbitration decision dated August 31, 2000. The arbitrator found that the employing establishment's removal of appellant effective November 2000 was without just cause because she was legitimately considered disabled by her physician when the employing establishment terminated appellant for refusing suitable work and being absent without leave. The Board, however, has held that findings by a different federal agency are not dispositive regarding issues arising under the Federal Employees' Compensation Act where such findings are made pursuant to different standards of proof. Thus, the arbitration decision is irrelevant as it pertains to the issue of this case of whether the Office properly terminated appellant's compensation pursuant to 5 U.S.C. § 8106.

[10] *See Talmadge Miller*, 47 ECAB 673 (1996).

[11] *Joe L. Wilkerson*, 47 ECAB 604 (1996); *Alberta S. Williamson*, 47 ECAB 569 (1996).

Appellant has not offered an acceptable reason for refusing the suitable work offer in this case. As she declined an offer of suitable work, the Office therefore properly terminated her compensation benefits pursuant to 5 U.S.C. § 8106.

The April 23, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
March 3, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member