United States Department of Labor
Employees' Compensation Appeals Board

BARBARA A. ZUKOFF, Appellant	)	
and	)	**Docket No. 04-30**
	)	**Issued: April 15, 2004**
DEPARTMENT OF DEFENSE, DEFENSE COMMISARY AGENCY, KINGS BAY COMMISSARY, Kings Bay, GA	)	

Appearances:
Barbara A. Zukoff, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On September 29, 2003 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated August 19, 2003. 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 terminated appellant's compensation on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On October 8, 1999 appellant, then a 38-year-old cashier, filed a traumatic injury claim alleging that on September 26, 1999 she strained her left and right wrists while she was scanning a heavy box of detergent. On April 10, 2000 she underwent an anterior cervical fusion with removal of central herniated nucleus pulposus. On June 28, 2000 the Office accepted appellant's claim for aggravation of herniated cervical disc and compensation was paid.

On August 25, 2000 the employing establishment provided a light-duty job offer to appellant as a customer service clerk, for 20 hours a week. The Office advised that the job duties would not require any lifting greater than 35 pounds and no turning of the head to the extremes more than 10 times an hour. By letter dated August 30, 2000, appellant stated that she was "unable to accept or decline" the job offer. She noted that she would discuss it with her physician. On September 5, 2000 appellant advised that her attending physician, Dr. Calvin H. Hudson, a Board-certified neurosurgeon, wanted to do further testing. An attached note from Dr. Hudson indicated that appellant should do "no work at present."

On September 19, 2000 the Office advised that it found the position of customer service clerk to be within appellant's work capabilities and gave her 30 days to either accept the position or provide a reason for fusing the job. By letter dated October 14, 2000, she again stated that she was unable to accept or decline the job for the reason that she was experiencing pain and that her physician, Dr. Hudson, wanted to do further testing. By letter dated October 30, 2000, the Office informed appellant that the reasons she gave for not accepting the position were unacceptable and that she had a period of 15 extra days to accept the position.

On November 1, 2000 Dr. Hudson indicated that additional medical tests showed nothing of a serious nature and indicated that he advised appellant that she should slowly get more active as her pain gets better. He further indicated that there was "not much else to do" and that he did not give appellant a return appointment.

On November 13, 2000 Dr. Carlos A. Levy, a Board-certified surgeon and pain management specialist, indicated that appellant was unable to return to work until cleared by a neurosurgeon. On the same date appellant indicated that she was unable to accept the August 25, 2000 job offer because she was not physically capable of performing the tasks.

Appellant began treatment with Dr. Carlos A. Oteyza, a Board-certified physiatrist, on December 6, 2000. In a December 6, 2000 report, he diagnosed cervical sprain/strain, left cervical disc protrusion involving the C6-7, C5-6 bulging disc, status post cervical decompression and cervical fusion; and lumbar sprain/strain with underlying annular bulging disc L5-S1. Dr. Oteyza noted that appellant had a permanent impairment of 16 percent, with a date of maximum medical improvement of December 6, 2000. On May 2, 2001 he indicated that appellant was unable to return to work as a cashier for the employing establishment. Dr. Oteyza stated: "At this point, [appellant] is considered totally disabled from any occupation."

On May 3, 2001 the Office asked Dr. Oteyza to respond to questions regarding appellant's ability to perform the job of a limited-duty customer service clerk. The Office sent a copy of the position description, which noted that it did not require any lifting greater than 35 pounds and no turning of her head to the extremes more than 10 times an hour.[1] Dr. Oteyza indicated by checking that appellant was able to perform the duties listed and could work part time or limited duty. He noted that appellant was totally disabled for cashier work on a permanent basis. On June 13, 2001 Dr. Oteyza completed a work capacity evaluation form which noted that appellant was limited in reaching and twisting to 1 to 2 hours and pushing,

[1] These were the work tolerance limitations set forth by Dr. Hudson in August 2 and 23, 2000 reports.

pulling and lifting 5 to 10 pounds for 4 hours. He indicated that appellant should start working four hours a day and increase to eight hours a day within four to six weeks.

On June 22, 2001 the employing establishment offered appellant the limited-duty position as a customer service clerk for 20 hours a week. The employing establishment noted that the position was specifically within the restrictions set by Dr. Oteyza: reaching and twisting 1 to 2 hours and pushing, pulling and lifting 5 to 10 pounds for 4 hours. By letter dated June 29, 2001, the Office informed appellant that it found the position to be suitable and that she had 30 days to either accept the position or provide an explanation for refusing it. By letter dated July 25, 2001, appellant wrote that she was unable to accept or decline the job offer. She indicated that Dr. Oteyza could not properly have found that she could do the position. Appellant indicated that she experienced pain every day and was looking for a new physician. By letter dated July 30, 2001, the Office informed her that her reasons for refusing the position were not found valid and that she had 15 days in which to accept the position. Appellant did not accept the position.

By decision dated April 16, 2002, the Office terminated appellant's compensation benefits for wage loss.

Appellant requested a hearing before a hearing representative. At the hearing, held on March 5, 2003 appellant testified that she could not perform the job as she would have to repeatedly lift gallon jugs of milk, change prices which would require her to lift her hands and squat, type and do data entry, all of which caused her pain. She noted that when she told Dr. Oteyza of her problems with the position, he dropped her as a patient. Appellant indicated that her medications caused drowsiness and occasional slurred speech.

By decision dated August 19, 2003, the hearing representative affirmed the Office's decision of April 16, 2002. The hearing representative found that the medical evidence established that appellant was capable of performing the offered limited-duty position.

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees' Compensation Act 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.[2] The Office 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, the Office 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.[3] In other words, to justify termination of

[2] 5 U.S.C. § 8106(c)(2).

[3] *Helen E. Paglinawan*, 51 ECAB 588, 593 (2000).

compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.[4]

ANALYSIS

In the instant case, the employing establishment offered appellant a position as a customer service representative. The Office found that this job was suitable and gave her appropriate notice to respond. Appellant refused the position and after giving her an additional 15 days notice to accept the position, the Office terminated benefits.

The evidence supports that the position of customer service clerk was within appellant's work restrictions. Dr. Oteyza limited her to reaching and twisting 1 or 2 hours a day and pushing, pulling and lifting of 5 to 10 pounds for 4 hours. When the employing establishment made the job offer on June 22, 2001 it noted that the position was within the restrictions set by Dr. Oteyza, *i.e.*, appellant would be limited to reaching 1 to 2 hours a day, pushing/pulling and lifting 4 hours a day of up to 10 pounds. There is no probative medical evidence in the record establishing that appellant cannot perform the activities required in the limited-duty position. Her opinion that she could not perform the duties of the job is insufficient to show that the job is unsuitable. Appellant did not submit rationalized medical opinion evidence in support of her contention that the limited-duty position or job requirements are outside her physical limitations.

The Office met the procedural requirements of its regulation on suitable work[5] by affording appellant 30 days to accept the offer or present reasons for her refusal. The Office gave appellant 15 more days to accept the position after it determined her reasons for refusing the offer were unacceptable. The Office properly complied with its procedural requirements in terminating appellant's wage-loss benefits.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation as she failed to accept suitable work.

[4] *Glen L. Sinclair*, 36 ECAB 664 (1985).

[5] 20 C.F.R. § 10.516.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 19, 2003 is hereby affirmed.

Issued: April 15, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member