United States Department of Labor
Employees' Compensation Appeals Board

DENISE DOLCE, Appellant	)	
and	)	**Docket No. 04-1260**
	)	**Issued: July 29, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Melville, NY, Employer	)	

Appearances:
Paul Kalker, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On April 13, 2004 appellant, through her attorney, filed an appeal of a decision dated October 1, 2003 in which the Office of Workers' Compensation Programs denied authorization for a discogram and spinal fusion surgery. She also appealed a November 24, 2003 decision in which the Office terminated her wage-loss compensation on the grounds that she refused an offer of suitable work and a March 19, 2004 decision in which the Office denied merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the October 1 and November 24, 2003 decisions and over the Office's March 19, 2004 decision denying merit review.

ISSUES

The issues are: (1) whether the Office properly denied authorization for a discogram and spinal fusion surgery; (2) whether the Office properly terminated appellant's wage-loss compensation effective November 30, 2003 pursuant to 5 U.S.C. § 8106(a); and (3) whether the Office properly refused to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On May 5, 2000 appellant, then a 39-year-old FTR mail processor, filed a Form CA-1, claim for compensation, alleging that she suffered back spasms and sprain while bending repeatedly at work. She stopped work that day. On June 9, 2000 the Office accepted that appellant sustained an employment-related low back strain. She was referred to nurse intervention, returned to limited duty for four hours per day on July 7, 2000, and continued to receive compensation for four hours per day. She subsequently filed claims for recurrences that she alleged occurred on July 11 and September 4, 2000. By decisions dated October 26 and December 4, 2000 respectively, the Office denied these recurrence claims.

On July 20, 2001 appellant filed a third recurrence claim, stating that she sustained a recurrence of total disability on July 3, 2001. She stopped work on July 5, 2001 and did not return. On October 24, 2001 the Office accepted that appellant sustained a recurrence of disability on July 3, 2001 and she was placed on the periodic rolls.

Appellant came under the care of Drs. Marc and Ira Chernoff, both Board-certified in orthopedic surgery, who advised that she was totally disabled. The Office continued to develop the claim and on March 20, 2002 referred appellant to Dr. Richard Goodman, also Board-certified in orthopedic surgery, for a second opinion evaluation. In a report dated April 12, 2002, Dr. Goodman noted his review of the record and physical examination of appellant. He advised that she had incurred a lumbosacral sprain, stating that the objective findings were minimal "as there is a total inconsistency between the range of motion and straight-leg raising test." The physician stated that there was no indication for further treatment and concluded that appellant was not disabled from residuals of the low back strain and could return to work as a mail processor for 8 hours a day with no lifting over 50 pounds. In an attached work capacity evaluation, Dr. Goodman provided no restrictions other than the 50-pound weight limit.

By report dated April 29, 2002, Dr. Marc Chernoff noted findings on back examination and recommended a magnetic resonance imaging (MRI) scan that was performed on May 23, 2002. Dr. David Panasci, Board-certified in diagnostic radiology, advised that the study demonstrated multilevel lumbar degenerative disc and facet disease and left foraminal disc herniations at L2-3 and L4-5 without compression of the left L2 or L4 nerve roots.

In a report dated June 17, 2002, Dr. Ira Chernoff provided a diagnosis of degenerative disc disease at L4-5 and L5-S1 and requested authorization for a discogram. On July 29, 2002 he added the diagnosis of low back pain and reiterated the request for a discogram, further stating that, if the study were positive, he would consider surgery. In a treatment note dated September 23, 2002, the physician diagnosed "chronic lower back pain with an initial sprain which has now resulted in degenerative disc disease at L4-5 and L5-S1 with disc herniations at L2-3 and L3-4," and repeated his request. Dr. Ira Chernoff continued to submit reports and in a narrative dated March 3, 2003 reported the history of injury and his limited review of medical records. He outlined appellant's treatment regimen since her initial evaluation on April 29, 2002 and advised that she was unable to work, opining, "[i]t is my opinion that the patient's symptoms are caused by degenerative disc disease in the lumbar spine which occurred from the injury on May 5, 2000." He stated that the initial diagnosis of lumbosacral sprain "was probably not accurate" and continued his recommendation for discogram and possible surgery.

Finding that a conflict in medical opinion existed between the opinions of Drs. Chernoff and Dr. Goodman regarding appellant's ability to work on March 15, 2003, the Office referred her to Dr. Arnold Illman, Board-certified in orthopedic surgery, for an impartial medical evaluation.[1] Dr. Illman furnished reports dated March 25, 2003 in which he diagnosed lumbosacral sprain and advised that, with on-the-job work hardening and some restrictions, appellant could return to full duty for eight hours per day. In an attached work capacity evaluation, the physician reiterated that appellant could work eight hours per day. He advised that maximum medical improvement had not been reached with the caveat that she was restricted for three months to no twisting or pushing, pulling or lifting greater than 25 pounds, after which she could progress to a 50-pound weight restriction and twist for 8 hours. He stated that no further diagnostic tests were needed.

In a work capacity evaluation dated April 28, 2003, Dr. Marc Chernoff advised that appellant suffered from low back pain and was unable to sit for more than 20 minutes or carry more than 20 pounds. He stated that maximum medical improvement had not been reached and recommended a functional capacity evaluation.

The Office referred appellant for vocational rehabilitation on May 6, 2003. In a May 19, 2003 report, Dr. Ira Chernoff voiced his disagreement with Dr. Illman's findings and repeated his discogram request. He continued to follow appellant.

On August 7, 2003 the employing establishment offered appellant an eight-hour-per-day modified mail processor position. Beginning August 23, 2003 she was to work eight hours per day of modified duty sorting letter mail into a case while seated or standing or culling and facing mail while seated or standing. The physical requirements indicated use of hands and fingers with weight up to five pounds, sitting and standing intermittently, and lifting partial letter trays weighing less than five pounds. The offer stated that appellant was not to exceed the 25-pound lifting restriction. Beginning October 18, 2003 she was to continue this work for 5 hours per day and was to work 3 hours per day operating automated equipment with physical requirements of lifting letter trays up to 20 pounds for 30 to 45 minutes, standing and walking for 3 hours and bending for 1 hour. Again, the October 18, 2003 job descriptions stated that she was not to exceed the 25-pound lifting restriction.

In a report dated September 7, 2003, a referral rehabilitation specialist advised that she had discussed the offered position with appellant. By letter dated September 26, 2003, the Office advised appellant that the position offered was suitable. She was notified of the penalty provisions of section 8106 and given 30 days to respond. In a decision dated October 1, 2003, the Office denied authorization for a discogram and for spinal fusion surgery.

In a letter dated October 22, 2003, appellant's attorney advised that she was physically unable to perform the offered position based on the medical evidence and submitted a September 29, 2003, treatment note from Dr. Ira Chernoff who diagnosed chronic low back pain with herniated discs. He reiterated his request for a discogram. By letter dated November 3, 2003, the Office advised appellant that her reasons for refusing the offered position were not

[1] Both Dr. Goodman and Dr. Illman were furnished with a set of questions, a statement of accepted facts and the medical record.

acceptable and she was given an additional 15 days to respond. In response she submitted an October 10, 2003 treatment note from Dr. Marc Chernoff who diagnosed chronic lower back pain and noted his disagreement with Dr. Illman's conclusions.

By decision dated November 24, 2003, the Office terminated appellant's wage-loss compensation, effective November 30, 2003, on the grounds that she declined an offer of suitable work. On February 9, 2004 appellant, through her attorney, requested reconsideration of the November 24, 2003 decision and argued that the position offered was not suitable and that Dr. Illman should not be credited. She submitted a treatment note from Dr. Marc Chernoff dated December 29, 2003 in which he repeated his previous diagnoses and recommendations. Dr. Marc Chernoff also submitted a narrative report dated January 19, 2004 in which he chronicled their treatment of appellant and advised that she had been continuously disabled since his initial evaluation on April 29, 2002. He opined that the May 5, 2000 injury "precipitated" appellant's subsequent disability and advised that she was physically unable to perform the offered position, stating "[s]he suffers from chronic back pain with herniated discs and degenerative disc disease, attributed to her work injury on May 5, 2000.... She currently has a marked disability and is unlikely to improve without surgery."

By decision dated March 19, 2004,[2] the Office denied the reconsideration request, finding that the evidence and argument submitted by appellant did not meet the requirements of section 10.608.

LEGAL PRECEDENT -- ISSUE 1

Section 8103 of the Federal Employees' Compensation Act[3] provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which the Office considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation.[4] In interpreting this section of the Act, the Board has recognized that the Office has broad discretion in approving services provided under section 8103, with the only limitation on the Office's authority being that of reasonableness.[5] Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[6] In order to be entitled to reimbursement for

[2] On March 4, 2002 the Office approved an attorney's fee request in the amount of $10,000.00. This decision has not been appealed to the Board.

[3] 5 U.S.C. §§ 8101-8193.

[4] 5 U.S.C. § 8103; *see Thomas W. Stevens*, 50 ECAB 288 (1999).

[5] *James R. Bell*, 52 ECAB 414 (2001).

[6] *Claudia L. Yantis*, 48 ECAB 495 (1997).

medical expenses, a claimant must establish that the expenditures were incurred for treatment of the effects of an employment-related injury.[7]

Proof of causal relationship in a case such as this must include supporting rationalized medical evidence. Thus, in order for a discogram or surgery to be authorized, appellant must submit evidence to show that these are for a condition causally related to the employment injury and that these were medically warranted. Both of these criteria must be met in order for the Office to authorize payment.[8]

Furthermore, in situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[9]

ANALYSIS -- ISSUE 1

In the case at hand, the Office accepted that appellant sustained an employment-related low back strain. While Drs. Ira and Marc Chernoff repeatedly requested authorization for a discogram and advised that, if the study were positive, surgery should be considered, the physicians diagnosed degenerative disc disease and disc herniations, conditions that had not been accepted by the Office as employment related.

Dr. Goodman, who provided a second opinion examination for the Office, advised that no further treatment was needed. Dr. Illman, the referee examiner, provided thorough, well-rationalized reports in which he explained his findings and conclusions, including that no further diagnostic tests were needed. The Board therefore finds that his opinion, is entitled to special weight in establishing that appellant had no need for further studies. Thus, the Office did not abuse its discretion in denying authorization for either the discogram or possible surgery as these were not medically warranted.

LEGAL PRECEDENT -- ISSUE 2

Section 8106(c)(2) of the Act provides in pertinent part, "A partially disabled employee who ... refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[10] To prevail under this provision, the Office must show that the work offered was suitable and must inform the employee of the consequences of refusal to accept such employment. An employee who refuses or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified.[11] Section 8106(c) will be

[7] *Cathy B. Mullin*, 51 ECAB 331 (2000).

[8] *Id.*

[9] *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[10] 5 U.S.C. § 8106(c)(2).

[11] *Janice S. Hodges*, 52 ECAB 379 (2001).

narrowly construed as it serves as a penalty provision which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[12]

The implementing regulation provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.[13] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[14]

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 medical evidence.[15] In assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[16]

ANALYSIS -- ISSUE 2

In the present case, the record reflects that the physical restrictions of the modified position offered to appellant on August 8, 2003 were in agreement with those provided by Dr. Illman, a Board-certified orthopedic surgeon who provided an impartial medical evaluation. In a March 25, 2003 report, Dr. Illman, who was furnished with the medical record, a set of questions and a statement of accepted facts, set forth appellant's history, complaints and his findings on physical examination. He advised that appellant could work for eight hours per day with the restriction that for three months she was to do no twisting or pushing, pulling or lifting greater than 25 pounds, after which she could progress to a 50-pound weight restriction and twist for 8 hours. The position offered to appellant included modified duty beginning August 23, 2003 with increasing duties beginning October 18, 2003. However, all duties up to and including those beginning October 18, 2003 comported with the restrictions provided by Dr. Illman in that a weight restriction of 25 pounds was in place and no twisting was indicated. While appellant's physicians Drs. Ira and Marc Chernoff continued to advise that she could not work, as stated earlier, in situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving

[12] *Gloria G. Godfrey*, *supra* note 9.

[13] 20 C.F.R. § 10.517(a).

[14] *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[15] *Gayle Harris*, 52 ECAB 319 (2001).

[16] *Maurissa Mack*, 50 ECAB 498 (1999).

the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[17] The Board finds that Dr. Illman provided such an opinion. The medical evidence of record thus establishes that, at the time the job offer was made, appellant was capable of performing the modified position.[18]

In order to properly terminate appellant's compensation under section 8106, the Office must provide appellant notice of its finding that an offered position is suitable and give appellant an opportunity to accept or provide reasons for declining the position.[19] The record in this case indicates that the Office properly followed the procedural requirements. By letter dated September 26, 2003, the Office advised appellant that a partially disabled employee who refused suitable work was not entitled to compensation and that the offered position had been found suitable. She was notified of the penalty provisions of section 8106 and allotted 30 days to either accept or provide reasons for refusing the position. In a letter dated November 3, 2003, the Office advised appellant that the reasons given for not accepting the job offer were unacceptable. She was given an additional 15 days in which to respond. There is, therefore, no evidence of a procedural defect in this case as the Office provided appellant with proper notice. She was offered a suitable position by the employing establishment and such offer was refused. Thus, under section 8106 of the Act, her compensation was properly terminated effective November 30, 2003.

LEGAL PRECEDENT -- ISSUE 3

To require the Office to reopen a case under section 8128(a) of the Act,[20] section 10.608(a) of the implementing regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).[21] This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[22] Section 10.608(b) provides that, when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[23]

[17] *Gloria J. Godfrey*, *supra* note 9.

[18] *Deborah Hancock*, 49 ECAB 601 (1998).

[19] *See Maggie L. Moore*, *supra* note 14.

[20] 5 U.S.C. § 8128(a).

[21] 20 C.F.R. § 10.608(a).

[22] 20 C.F.R. § 10.608(b)(1) and (2).

[23] 20 C.F.R. § 10.608(b).

ANALYSIS -- ISSUE 3

With her reconsideration request appellant submitted reports from Dr. Marc Chernoff dated December 29, 2003 and January 19, 2004. The Board, however, finds that in these reports Dr. Chernoff merely reiterated his previous conclusions and recommendations in that he continued to opine that appellant was totally disabled and that her degenerative disc disease and herniated discs were caused by the May 5, 2000 employment injury. The Board therefore finds the medical evidence duplicative. Appellant, through her attorney, also argued that the offered position was not suitable and that Dr. Illman should not be credited. Appellant's attorney essentially made these arguments in his letter dated October 22, 2003 made in response to the Office's 30-day letter dated September 26, 2003. Likewise, Dr. Marc Chernoff, in his treatment note dated October 10, 2003, submitted in response to the Office's 15-day letter dated November 3, 2003, noted his disagreement with Dr. Illman's findings and conclusions.

The Board has held that the submission of evidence or argument which repeats or duplicates that already in the case record does not constitute a basis for reopening a case.[24] Appellant therefore did not show that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. Further, she failed to submit relevant new and pertinent evidence not previously considered by the Office. As appellant did not meet any of the necessary regulatory requirements, she was not entitled to a merit review.[25]

CONCLUSION

The Board finds that the Office properly denied authorization for a discogram and spinal fusion surgery, properly terminated appellant's wage-loss compensation effective November 30, 2003 pursuant to 5 U.S.C. § 8106(a) and properly refused to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a).

[24] *Edward W. Malaniak*, 51 ECAB 279 (2000).

[25] *See James E. Norris*, 52 ECAB 93 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 19, 2004 and November 24 and October 1, 2003 be affirmed.

Issued: July 29, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member