United States Department of Labor
Employees' Compensation Appeals Board

KAREN L. MARTIN, Appellant	)	
and	)	**Docket No. 04-295**
	)	**Issued: June 9, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Charleston, WV, Employer	)	

Appearances:
Belinda S. Morton, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On November 13, 2003 appellant, through her attorney, filed a timely appeal from the Office of Workers' Compensation Programs' decision dated August 11, 2003, which denied modification of her claim and a June 3, 2003 decision of an Office hearing representative, which affirmed the termination of compensation benefits based on her refusal of an offer of suitable work. In an April 22, 2003 decision, the Office denied appellant's request to expand her claim to include a neck condition of cervical strain or cervical radiculopathy. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation, effective March 1, 2002, based on her refusal to accept suitable employment; and (2) whether appellant's claimed neck conditions are related to the occupational injury of September 20, 1999.

FACTUAL HISTORY

On September 22, 1999 appellant, then a 23-year-old casual clerk, filed a claim for muscle spasms in her lower back, which occurred on September 20, 1999 during the performance of her duties. Appellant sought medical treatment the same day and has not returned to work. The Office accepted her claim for a lumbosacral sprain and paid appropriate benefits.

On August 1, 2000 Dr. Josiah K. Lilly, a Board-certified anesthesiologist specializing in pain management, opined that appellant had reached maximum medical improvement from pain management and was able to return to modified employment. In an August 8, 2000 work capacity evaluation, Dr. Lilly opined that appellant was able to work four hours a day with restrictions.

On August 30, 2000 Dr. John H. Schmidt, III, a Board-certified neurosurgeon and appellant's treating physician, advised that the repeat lumbar magnetic resonance imaging (MRI) scan of August 23, 2000 did not reveal any significant changes from the November 20, 1999 MRI scan and advised that appellant had reached maximum medical improvement.[1] A functional capacity evaluation (FCE) was recommended. In a September 6, 2000 attending physician's report (Form CA-20), Dr. Schmidt opined that appellant was totally disabled.

In a September 21, 2000 FCE summary report, appellant was noted to be functioning at a sedentary level. The limiting factor was a low back condition with no symptom exaggeration, but testing revealed a "perceived functional disability level of crippled." In a September 22, 2000 report, Joe Spillson, a licensed occupational therapy rehabilitation specialist, opined that appellant should be able to manage three hours a day in a sedentary work position, with the ability to change positions as needed and should not lift greater than ten pounds. He noted that appellant had difficulty reaching below her knees and opined that a safe lifting range would be above knees to shoulder height.

On September 26, 2000 the employing establishment offered appellant modified duties to be performed for three hours a day from 8:00 to 11:00 a.m. at Stanaford, West Virginia. Based on the physical limitations established by the recent functional evaluation study, the recommended duties appellant would perform were boxing mail, answering telephones, filing, forwarding of mail, label making and other activities within appellant's specified restrictions. The physical requirements included sitting up to 3 hours per shift, with the ability to stand or sit intermittently at will, lifting 5 pounds continuously with no more than 10 pounds occasionally, carrying no more than 10 pounds occasionally and pushing or pulling no more than 20 pounds occasionally. Appellant was advised that the limited-duty assignment was only valid during the time she was incapacitated from her regular duties or for 30-calendar days, whichever came first. It further noted that such limited-duty assignment must be renewed every 30 days.

In a September 30, 2000 report, Dr. George J. Orphanos, a Board-certified orthopedic surgeon and Office referral physician, advised that he reviewed the statement of accepted facts

[1] An MRI scan performed on August 23, 2000 revealed a persistent small central disc protrusion at L4-5 without change from the earlier MRI scan of November 20, 1999.

and the medical records. Examination findings were presented along with objective tests appellant underwent. A diagnosis was provided of a chronic musculoskeletal mechanical back strain superimposed on small central subligamentous disc herniation with no lateralization and no associated neurological abnormalities or specific radiculopathy. Dr. Orphanos stated that appellant had subjective stocking-type hypoesthesia affecting the entire left lower extremity with no motor weakness. Appellant was deconditioned and presented with a considerable limitation of range of motion of the lumbar spine. The physician further stated that appellant presented signs and lack of motivation to return to any activities, even light duty, due to chronic pain and limitation of daily activities. This was based on the work capacity evaluation form filled out in his office, which concerned appellant's responses to her daily activities. Dr. Orphanos recommended physical therapy and a conditioning program. In a September 27, 2000 work capacity evaluation report (Form OWCP-5c), Dr. Orphanos opined that appellant was able to work with restrictions. This included restrictions of no sitting, walking, reaching or pulling for more than 10 minutes at a time, no pushing or pulling more than 20 pounds and no lifting over 10 pounds. Other limitations such as reaching, reaching above the shoulder and operating a motor vehicle were also noted. The amount of time appellant would be able to work, however, was not specified.

In a letter dated September 29, 2000, a nurse case manager provided Dr. Schmidt with the September 21, 2000 FCE and addendum report to inquire as to appellant's work capacity. On October 15, 2000 Dr. Schmidt responded that appellant could not return to work in the limited-duty job offer. He noted that appellant would benefit from physical therapy, she had reached maximum medical improvement and, other than physical therapy, he did not have any treatment recommendations.

In an October 10, 2000 report, Dr. Schmidt noted his examination findings and that appellant had undergone the FCE, which suggested that she should be able to work three hours a day in a sedentary capacity. The physician noted that appellant had experienced an increase in pain following her discharge from the FCE and stated: "it [was] not likely at all that she [would] be able to sustain [three] hours a day in a sedentary position." He opined that appellant had reached maximum medical improvement medically, but that she remained totally disabled.

In an October 13, 2000 letter, appellant wrote that her physician stated that she could not work at this time.

On October 26, 2000 the employing establishment reoffered appellant modified duties to be performed for three hours from 8:00 a.m. to 11:00 a.m. in her hometown post office at Danese with the same recommended duties and physical restrictions of the prior job offer. By letter dated October 26, 2000, the employing establishment requested that Dr. Schmidt review the attached October 26, 2000 job offer.

In a November 10, 2000 report, Dr. Schmidt advised that appellant's symptoms and examination were essentially unchanged from his previous report. He reiterated that appellant experienced a severe increase in her pain following her discharge from the FCE and that it was not likely that she would be able to sustain three hours a day in a sedentary position. He stated that appellant has a postlaminectomy syndrome and she remained totally disabled.

By letter dated January 15, 2002, the Office advised appellant that the position of postal administrator with the employing establishment was found suitable to her work capabilities and remained available.[2] The Office stated that appellant had 30 days to either accept the position and return to work or give her reasons for refusing it. The Office indicated that, if she failed to accept the position, any explanation or evidence, which she provided would be considered prior to determining whether her reasons for refusing the job were justified. The Office notified appellant of the consequences of refusing suitable work without justification. Appellant did not respond.

By decision dated March 1, 2002, the Office terminated appellant's compensation benefits on the basis that she refused an offer of suitable work based on the employing establishment's job offer of September 26, 2000. The Office found that the weight of the medical evidence rested with Dr. Orphanos.

In an undated letter, received by the Office's Branch of Hearings and Review on March 18, 2002, appellant requested a hearing, which was held on February 26, 2003. Submitted at the hearing was a November 30, 2001 Social Security Administration decision, which found that appellant was entitled to benefits commencing September 20, 1999.

While appellant was disputing her termination decision, the Office received a January 6, 2003 medical report from Dr. Ralph Simms, a general practitioner, requesting that appellant's file be updated to include additional diagnoses and that the Office approve an MRI scan of the cervical area. In a December 6, 2002 report, Dr. Simms noted that appellant had recently complained of pain in the cervical area and that, since first seen on April 4, 2002, her symptoms became progressively worse and was compounded by weight gain and inactivity. In a January 6, 2003 report, Dr. Simms noted his examination findings and provided an impression of history of lumbosacral strain and cervical strain/sprain. He advised that, on appellant's initial evaluation of April 4, 2002, she stated that her back was hurting so bad that she did not notice her neck hurting until about two to three weeks after the initial compensable injury.[3] The physician advised that appellant's current working diagnoses were lumbosacral disc disease with myelopathy and cervical strain/sprain with radiculopathy. The physician requested that appellant's file be updated to include those diagnoses and requested that the Office approve an MRI scan of the cervical area.

In a February 25, 2003 report of telephone call, the Office advised appellant that the cervical condition or request for a cervical MRI scan could not be approved at this time. It noted that the April 2002 report first mentioned a neck condition and there were no medicals closer to the 1999 injury.

[2] The Office referenced the September 26, 2000 job offer from the employing establishment. The Office apparently referred to the light-duty position as a postal administrator, although the September 26, 2000 job offer contained no position title.

[3] In his April 4, 2002 report, Dr. Simms had noted the history of injury and appellant's treatment, presented examination findings and provided an impression of history of lumbosacral strain/sprain progressing to lumbosacral disc disease with myelopathy.

In a letter dated March 12, 2003, appellant's attorney requested that the Office authorize another FCE. On February 28, 2003 appellant's attorney wrote to Dr. Schmidt requesting that he complete a duty status (Form CA-17) and a March 10, 2003 reply letter from Neurological Associates, Inc., which advised in order to properly complete the form, the patient must undergo an FCE.

In an April 22, 2003 decision, the Office denied appellant's request to expand her claim to include the neck conditions of cervical strain or cervical radiculopathy as the medical evidence did not demonstrate that the claimed medical condition was related to the established work-related event.

By decision dated June 3, 2003, an Office hearing representative affirmed the March 1, 2002 decision.

In a June 16, 2003 letter, appellant, through her attorney, requested reconsideration, asserting that appellant was totally disabled as a result of her occupational injury and that the Office hearing representative failed to consider the reports from Dr. Simms when rendering her decision. The attorney noted that she received no response to her request for an FCE and that appellant hurt her neck at the time of the original injury.

In a May 12, 2003 report, Dr. Simms reported that appellant sustained an injury to her neck and back while working for the employing establishment and had been treated for lumbosacral disc disease with myelopathy and cervical strain/sprain with radiculopathy. The physician noted that the constant pain and inability to perform any useful work has resulted in appellant being depressed. He recommended that appellant get an orthopedic consult. Resubmitted was a March 12, 2003 duty status report (Form CA-17), in which Dr. Simms opined that appellant was totally disabled.[4]

By decision dated August 11, 2003, the Office reviewed the case on the merits but found that the evidence submitted was insufficient to warrant modification of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

Section 8106(c)(2) of the Federal Employees' Compensation Act states: "a partially disabled employee who: (1) refused to seek suitable work; or (2) refuses or neglects to work after suitable work is offered is not entitled to compensation."[5] An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[6] Section 8106(c) will be narrowly construed as it serves as a

[4] The Board notes that the record also contains a June 21, 2002 report, from Dr. James M. Leipzig, a Board-certified orthopedic surgeon, who provided an opinion on appellant's back condition, but made no findings on disability.

[5] 5 U.S.C. § 8106(c)(2).

[6] 20 C.F.R. § 10.517; *Gayle Harris*, 52 ECAB 319 (2001).

penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[7]

ANALYSIS -- ISSUE 1

The Board finds that the question of whether appellant remains totally disabled is still unresolved. Appellant's attending physician, Dr. Schmidt, opined that appellant was totally disabled. He noted that, as appellant had experienced a severe increase in her pain, following her discharge from the FCE, it was not likely that she would be able to work for three hours a day in a sedentary position. The Office referral physician, Dr. Orphanos, opined that appellant was capable of working with restrictions.

Section 8123(a) of the Act,[8] provides: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." In this case, appellant's attending physician, Dr. Schmidt, found that appellant remained totally disabled as a result of the accepted employment injury. The Office referral physician, Dr. Orphanos, opined that appellant was capable of working within specified restrictions. Due to the difference of opinion between appellant's attending physician and the Office referral physician, the Board finds that there is a conflict of medical opinion regarding whether appellant is totally disabled as a result of her accepted conditions. Because the medical evidence of record was in conflict at the time of the Office's March 1, 2002 decision, the Office did not meet its burden of proof to terminate appellant's compensation based on a refusal of suitable work.

LEGAL PRECEDENT -- ISSUE 2

When an employee claims that he or she sustained an injury in the performance of duty, the employee must submit sufficient evidence to establish that he or she experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. The employee must also establish that such event, incident or exposure caused an injury. Once an employee establishes an injury in the performance of duty, he or she has the burden of proof to establish that any subsequent medical condition or disability for work, which the employee claims compensation, is causally related to the accepted injury.[9] To meet his or her burden of proof, an employee must submit a physician's rationalized medical opinion on the issue of whether the alleged injury was caused by the employment incident.[10] Medical conclusions unsupported by rationale are of diminished probative value and are insufficient to establish causal relation.[11]

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

[8] 5 U.S.C. § 8123(a).

[9] *See Leon Thomas*, 52 ECAB 202 (2001).

[10] *See Gary J. Watling*, 52 ECAB 278 (2001).

[11] *Albert C. Brown*, 52 ECAB 152 (2000).

ANALYSIS -- ISSUE 2

In the present case, the Office accepted that appellant sustained a lumbosacral strain as a result of the September 20, 1999 work injury. Following the injury, appellant first mentioned in her April 4, 2002 examination with Dr. Simms that she "really did not notice her neck hurting for about 2 [to] 3 weeks later when her back started easing up a little bit." Appellant also related that she has been on and off medications and has had numerous interventions and physical therapy.

The record, however, does not contain evidence of bridging symptoms during the approximately two and a half-year period between September 1999, when appellant's condition was accepted for a lumbosacral strain and January 6, 2000 when Dr. Simms diagnosed a cervical strain/sprain and cervical strain/sprain with radiculopathy. Appellant's claimed cervical condition must be supported by rationalized medical evidence explaining the relationship between the accepted work injury and the diagnosed conditions of cervical strain and cervical radiculopathy. An opinion that a work-related injury several years prior caused another condition or disability to occur must be based on bridging evidence between the injury and the period of disability or other explanation.[12] Without supporting medical rationale from a physician, appellant's personal belief that her neck condition arose from the work incident of September 20, 1999 is not sufficient to establish her claim.[13]

Although Dr. Simms had noted the September 20, 1999 work injury in his April 4, 2002 report, he did not provide an opinion on the cause of appellant's cervical conditions in his subsequent report of January 6, 2003. The physician merely restated that appellant's back was hurting so bad that she did not notice her neck hurting until about two or three weeks later. He failed to explain how appellant's cervical conditions were pathophysiologically related to the September 20, 1999 incident. He also did not account for the lack of reported neck complaints from September 1999 to his first examination in April 2002 or why medical care was not sought.[14] Dr. Simms' report is incomplete and does not establish a causal relationship between appellant's current cervical conditions and the accepted work injury.

Appellant has not met her burden of proof because the medical opinion evidence in this case is insufficient to establish the critical element of causal relationship between appellant's cervical conditions and the accepted work injury.[15]

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[12] *See Linda L. Mendenhall*, 41 ECAB 532 (1990).

[13] *See Alfredo Rodriguez*, 47 ECAB 437 (1996).

[14] *See Joan R. Donovan*, Docket No. 03-297 (issued June 13, 2003).

[15] The Board further notes that, although appellant's attorney, in a May 12, 2003 letter, had requested a "review of the written record" with regard to the April 22, 2003 decision and submitted a partial medical report dated October 9, 1999 from Dr. Prakash Puranik, an orthopedic surgeon, the Office has not issued a decision on appellant's request for reconsideration. As there is no final decision of the Office to review, the Board may not review the October 9, 1999 report from Dr. Puranik. *See* 20 C.F.R. § 501.2(c).

CONCLUSIONS

The Board finds that the Office did not meet its burden in terminating compensation benefits on the basis that appellant refused suitable employment as a conflict in the medical opinion evidence existed as to whether she is totally disabled as a result of her accepted employment injury. The Board further finds that appellant has not established that her cervical condition is causally related to her accepted employment injury.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 11 and June 3, 2003 decisions are reversed and the case remanded for further development. The Office's April 22, 2003 decision is affirmed.

Issued: June 9, 2004
Washington, DC

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member