

**United States Department of Labor
Employees' Compensation Appeals Board**

GERETHA W. ARMOUR, Appellant)
and) Docket No. 04-792
U.S. POSTAL SERVICE, OAK PARK POST) Issued: October 25, 2004
OFFICE, Oak Park, IL, Employer)

)

Appearances:

Thomas S. Harkins, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On February 6, 2004 appellant filed a timely appeal from the November 21, 2003 merit decision by the Office of Workers' Compensation Programs, which found that she had not submitted sufficient medical evidence to warrant modification of its December 12, 2002 decision, in which the Office terminated her compensation for refusal to accept suitable work. The Board has jurisdiction over the merits of this case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly terminated appellant's compensation for refusal to accept an offer of suitable work.

FACTUAL HISTORY

On August 15, 1995 appellant, then a 46-year-old mail carrier, slipped on wet stairs while delivering mail, twisting her right knee. She underwent surgery on her knee on October 25, 1995. In an October 30, 1995 report, Dr. Boone Brackett, a Board-certified

orthopedic surgeon, stated that the anterior and posterior cruciate ligaments were intact as were the medial and lateral semi-lunar cartilages. He indicated that a large supratellar plicum was found and resected. Dr. Boone also noted patellofemoral arthritis.

On June 23, 1997 appellant was walking close to the sidewalk while pushing a cart of mail when she twisted her left foot on the edge of the sidewalk. In a November 5, 1997 report, Dr. Mark Cavaleves, a Board-certified orthopedic surgeon, stated that arthroscopic surgery showed that she had fraying and degeneration of the posterior horn of the medial meniscus. He noted a Grade 3 chondromalacia of the left femoral groove of the patella with fissuring and cracking with some loss of the articular cartilage. Dr. Cavaleves trimmed this area during surgery. He also found a Grade 2 chondromalacia of the tibial condyle with traction fissures but no loss of articular cartilage. Dr. Cavaleves noted that appellant had deposits of calcium pyrophosphate crystals on the medial meniscus. In a November 13, 1997 letter, the Office informed appellant that it had accepted her claim for a torn meniscus of the left knee and a sprain of the left ankle. The Office authorized an arthroscopy of the left knee.

In a March 26, 1998 report, Dr. Cavaleves stated that appellant had Grade 4 osteoarthritis of the left knee. He recommended a joint replacement. On August 26, 1998 appellant underwent another arthroscopic operation on her left knee. Dr. Cavaleves stated that the femoral groove of the patella was denuded of articular cartilage along the length of the patella. He diagnosed a Grade 4 chondromalacia of the femoral groove. Dr. Cavaleves indicated that in the corresponding area of the patella appellant had a Grade 3 chondromalacia. He reported the menisci were intact but the medial meniscus showed degenerative changes. On October 6, 1999 Dr. Cavaleves performed left knee replacement surgery on appellant.

In a June 11, 1999 office note, Dr. Cavaleves indicated that appellant complained of hip pain. He diagnosed trochanteric bursitis. Appellant filed an occupational disease claim for her hip condition on June 21, 1999. In an August 30, 1999 letter, the Office informed her that it had deleted her occupational disease claim for a bilateral hip condition. The Office stated that the evidence of record demonstrated that the hip condition was a consequential condition.

The Office paid compensation for the periods appellant did not work. On August 1, 1999 the Office began payment of temporary total disability compensation.

Dr. Cavaleves submitted progress reports on appellant's condition after the October 6, 1999 operation. He indicated that she had continued pain and limitation of motion in the left knee. In a February 24, 2000 report, Dr. Cavaleves noted that a February 11, 2000 magnetic resonance imaging (MRI) scan showed an L4-5 herniated disc. Appellant continued to complain of pain in her left knee, as well as pain in her left hip and in her lower back. On November 22, 2000 she underwent surgery for a total revision of her left knee, removing scar tissue between the patella and the femoral component of the artificial knee and between the tibial insert and the femur. Dr. Cavaleves removed a plastic insert in the artificial joint, irrigated the area and reinserted a new plastic insert, which allowed the patella to track well in motion.

On April 25, 2001 appellant underwent surgery on her right knee. Dr. Cavaleves stated that she had a Grade 3 chondromalacia of the patella which was trimmed. He reported that the menisci were intact. Dr. Cavaleves indicated that the rest of the articular cartilage was intact

except for the medial femoral condyle which had a Grade 2 lesion from a fragment that had chipped off. He trimmed off the edges of the condyle.

In a September 19, 2001 report, Dr. Judy Law, a Board-certified internist, reviewed appellant's medical history. She noted that appellant also suffered from bursitis of the left hip since August 1999. Dr. Law mentioned appellant's history of degenerative arthritis of the lumbar spine since 1994. She indicated that appellant had a flare up of low back pain and left sciatica in July 2000 which was treated by cortisone injections. Dr. Law stated that appellant was in constant pain from her back, hip and knees. She concluded that appellant was totally disabled because she could not stand or walk and could not sit for prolonged periods.

The Office referred appellant to Dr. Richard H. Sidell, a Board-certified orthopedic surgeon, for an examination and second opinion on the extent of her condition. In a November 28, 2001 report, he stated that appellant had preexisting significant arthritis of both knees. Dr. Sidell concluded that the employment injuries of August 15, 1995 and June 23, 1997 represented temporary aggravations of the preexisting condition. He stated that appellant was not capable of working without restriction. Dr. Sidell indicated that she could work in a sedentary level of activity only, requiring no significant ambulation and no bending or lifting. He concluded that, otherwise appellant would be unable to perform work duties. Dr. Sidell related these restrictions to her preexisting osteoarthritis involving the patellofemoral joints of both knees and the left knee arthroplasty.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Paul Belich, a Board-certified orthopedic surgeon, to resolve the conflict in the medical evidence between Dr. Cavaleves and Dr. Sidell. In a February 26, 2002 report, Dr. Belich reported that x-rays of the left knee revealed a total knee replacement with a questionable lateral tilt and subluxation of the patella and patellar component. X-rays of the right knee showed narrowing at the medial joint space and narrowing at the patellofemoral joint. Dr. Belich diagnosed status post left total knee arthroplasty with mild patellar mal-alignment, degenerative disease of the right knee and chronic lumbar spondylosis secondary to chronic lumbar disc disease. He stated that no additional surgery should be performed on appellant for various medical conditions. Dr. Belich indicated that the only work she was qualified for was a sedentary type job which would not involve any repetitive bending below the waist, lifting or carrying any objects. He noted that appellant had not worked in three years in any capacity, even though he thought she possibly could perform a sedentary job. Dr. Belich stated that, in reality, appellant was not going to be able to get back to work and if no job description could be found for her that fit what he and Dr. Sidell had stated, then she should be declared totally disabled from any and all employment.

In an April 9, 2002 report, Dr. Cavaleves commented that, in regards to both knees, appellant could work at a sedentary position. The employing establishment offered her a light-duty position effective May 11, 2002. The employing establishment stated that her duties would include hand stamping undeliverable mail, checking change of address forms, removing inaccurate bar code, checking the bulk mail for accuracy, checking the accuracy of mail sent to the central forwarding system and assisting customers at the passport window. The employing establishment stated that appellant would perform sedentary duties and wrote "sedentary work only" in the spaces provided for listing physical restrictions with regard to sitting, standing,

walking, bending, pushing, pulling, reaching, climbing and twisting. In a May 6, 2002 response, appellant declined the position. The employing establishment then submitted a revised job offer to her, adding that she would be required to lift up to five pounds. In a May 16, 2002 response, appellant declined the position, noting that she had elected disability retirement.

In a June 21, 2002 letter, the Office found that the job offered to appellant by the employing establishment was suitable for her. The Office stated that it had reviewed her reason for refusing the job offer, acceptance of disability retirement and concluded that her reason for refusal was unacceptable because medical reports indicated that she was able to work. The Office gave appellant 30 days to accept the position or give an explanation for her reasons for refusing the job. It indicated that after 30 days a final decision would be made on whether her reasons for refusing the job were justified. The Office warned that if appellant unreasonably refused the offered position, failed to report for work or stop working in the offered position her compensation would be terminated.

In a July 10, 2002 letter, appellant stated that she had refused the offered position due to health reasons. She noted that she had previously performed all the listed duties except working at a window. Appellant indicated that these positions required bending, pushing and lifting trays of mail. She commented that she had worked at these duties for almost three years when she was taken off work. Appellant recounted her total knee replacement surgery. She claimed that no job at the employing establishment was sedentary. Appellant also indicated that she had moved to a warm climate due to arthritis in her hip and both knees. She stated that she would be unable to travel due to cold weather.

The Office contacted the employing establishment which confirmed that the job offered to appellant was still available. In a September 3, 2002 letter to appellant, the Office indicated that it had considered her reasons for refusing the offered position. The Office informed appellant that it had found her refusal to accept the position was unjustified. The Office gave appellant 15 days to accept the position without penalty. It warned that if she still refused the position, her compensation would be terminated.

In a November 6, 2002 letter, the employing establishment informed the Office that appellant had not reported for work at the offered position. In a December 10, 2002 decision, the Office terminated appellant's compensation for refusal to accept suitable work.¹

In a July 30, 2003 letter, appellant requested reconsideration. She indicated that she had moved to Gilbert, Arizona on June 10, 2002. Appellant related that she was referred to a physician who stated that her knee replacement had been inserted improperly. The physician indicated that he would not operate on appellant's knees until her back condition improved. Appellant contended that her condition had prevented her from returning to work.

Appellant submitted a September 10, 2002 report from Dr. Theodore P. Firestone, a Board-certified orthopedic surgeon, who stated that she was restricted in walking, able to go only 10 to 15 minutes at best. He noted that appellant complained of considerable pain while at rest.

¹ During this period, the Office was considering whether appellant was entitled to a schedule award for permanent impairment of both legs. The Office ceased its consideration when appellant's compensation was terminated.

Dr. Firestone related that she had received a diagnosis of a herniated lumbar disc two years previously. On examination he stated that appellant had a significant antalgic gait which showed a predominant lower back component. Dr. Firestone commented that she could not maintain spine extension and maintained a 10 degree spinal flexion. He indicated that the left knee showed some subcutaneous atrophy. Dr. Firestone stated that appellant had a 2+ medial laxity in the knee, especially in flexion. He noted a clunk in mid flexion which was symptomatic. Dr. Firestone stated that appellant had difficulty flexing her knee beyond 75 degrees secondary to discomfort with passive flexion limited to 90 degrees. He indicated that x-rays showed minimal narrowing of the medial compartment with sclerotic change on both sides of the joint. He found some spurring on the tibial eminences. Dr. Firestone reported that x-rays of the left knee showed cemented components in place. He commented that appellant had a slight posterior translation of the femoral component with a millimeter of radiolunency posteriorly. Dr. Firestone stated that it would be difficult to assess the stability and overall function of the left knee replacement because of the predominance of appellant's back pain.

Appellant also submitted a July 7, 2003 report from Dr. Robert J. Fauer, a Board-certified family practitioner, who stated that, based on her medical records, she was unable to perform even sedentary job functions on May 11 and 18, 2002. He indicated that appellant had severe knee arthritis, hip pain and lumbar radiculopathy which prevented her from performing the job duties outlined in the job offer presented by the employing establishment.

In a January 14, 2003 report, Dr. Richard Zipnick, a Board-certified orthopedic surgeon, stated that appellant had a lumbar MRI scan which showed a synovial cyst at L2-3 adjacent to the left facet joint. He indicated that the L4-5 disc had broad based disc bulging with mass effects against the ventral thecal sac. Dr. Zipnick reported that appellant had bilateral facet degenerative changes and narrowing neuroforamen bilaterally. He diagnosed lumbar radiculopathy, left L5 nerve root with occasional symptoms from the S1 nerve root. Dr. Zipnick also diagnosed failed left knee surgery. In a July 8, 2003 report, he stated that since he had not seen appellant prior to January 4, 2003, it was difficult to state her work capabilities before that date. Dr. Zipnick indicated, however, that it was beyond a reasonable degree of medical probability that since appellant had been accepted for disability retirement, the job offer was unacceptable because her back was bothering her.

Appellant also submitted a June 19, 2003 report from Dr. Cavalcenes, who stated that she could not have performed the limited-duty assignment offered to her. He stated that appellant was still under his care for left hip bursitis and low back strain. Dr. Zipnick declared that he had not released her from his care for those medical problems.

In a September 15, 2003 nonmerit decision, the Office denied appellant's request for reconsideration on the ground that she had not submitted any legal arguments or new evidence in support of her request, but only gave a summary of the case and submitted evidence that had been submitted previously.

On October 13, 2003 appellant again requested reconsideration. She submitted a January 10, 2003 report from Dr. Firestone, who indicated that appellant was somewhat improved from her previous examination. He stated that x-rays of the left knee showed the cemented components in place. Dr. Zipnick noted scattered radiolunencies and a two millimeter

radiolunency anteriorly with some resorption. He found some extension malalignments on the femoral side and pointed out that the patella was tilted on one x-ray. Dr. Zipnick indicated that x-rays of the right knee showed early degenerative change with some sclerotic margins along the medial compartment.

Appellant's attorney argued that the Office had not accepted all the medical conditions of appellant, particularly her back condition. He contended that Dr. Cavalenes had not released her to perform any position that required lifting, pushing or pulling. Counsel stated that the termination of appellant's temporary total disability compensation did not prevent her from receiving a schedule award. He also argued that the Office had not considered whether it was prohibitively expensive for appellant to move from Arizona back to Illinois to perform the offered job.

In a November 21, 2003 decision, the Office denied appellant's request for modification on the grounds that the evidence and legal arguments presented were insufficient to warrant modification of the prior decision.

LEGAL PRECEDENT

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."² An employee who refuses or neglects to work after suitable work has been offered to her has the burden of showing that such refusal to work was justified.³ To justify terminating compensation for refusal of suitable work, the Office must show that the work offered is suitable for the employee.⁴ All impairments, whether work related or not, must be considered in assessing the suitability of the offered position.⁵

ANALYSIS

The Office concluded that appellant could perform the duties of the offered position based on Dr. Cavalenes' April 9, 2002 statement that she could perform sedentary duties. However, in his June 9, 2003 report, Dr. Cavalenes stated that appellant was unable to perform the duties of the offered position. He indicated that he had not released her from treatment for her back condition and bursitis of the hip. As appellant's attorney pointed out, Dr. Cavalenes had released her for sedentary duty only as far as her left knee was concerned. Since he has given contradictory opinions on whether appellant could perform sedentary work, including the duties of the offered position, the probative value of his statements is limited. Therefore, the April 9, 2002 report of Dr. Cavalenes does not have sufficient probative value to support the Office's determination that appellant could perform the sedentary duties of the offered position.

² 5 U.S.C. § 8106(c)(2).

³ 20 C.F.R. § 10.124.

⁴ *Kenneth R. Love*, 50 ECAB 193, 197 (1998).

⁵ *Edward J. Stabell*, 49 ECAB 566 (1998).

Dr. Sidell stated that appellant could perform sedentary work. Dr. Belich stated that appellant could perform sedentary work that did not require lifting, carrying or repetitive bending below the waist. The job description of the offered position indicated that appellant would be required to lift and carry up to five pounds. Dr. Belich indicated that, realistically, appellant would be unable to return to work. His report contradicts the conclusion of the Office that appellant could perform duties that required lifting and carrying up to five pounds.

There is no indication that the Office took appellant's other medical conditions into account in determining whether she could perform the duties of the offered position. Dr. Cavalenes noted her bursitis in June 1999. The Office accepted the condition as a consequential injury. Dr. Cavalenes also reported that an MRI scan showed appellant had a herniated L4-5 disc. Dr. Law stated that appellant was totally disabled for work due to her knee, hip and back conditions. Dr. Firestone and Dr. Zipnick described her bulging L4-5 disc and other degenerative problems which affected her ability to work. Dr. Firestone indicated that the left knee replacement surgery had resulted in a tilted patella and extension misalignment. Dr. Fauer and Dr. Zipnick stated that, based on medical records, appellant could not have performed the duties of the offered position because her hip pain, lower back condition and knee condition prevented her from working. These reports provide extensive evidence that appellant was unable to perform the duties of the offered position. The medical evidence of record demonstrates that the Office did not establish that the position offered to appellant was suitable because it did not take into account her back and hip conditions which also affected her ability to work.⁶

The medical evidence of record, therefore, shows that the report of Dr. Cavalenes contradicted the report the Office used as a basis for its determination that the job offered to appellant was suitable. While Dr. Sidell stated that she could perform sedentary work, Dr. Belich, the impartial medical specialist, gave job restrictions of no lifting or carrying, which the job offer exceeded. The Office also failed to take into account appellant's hip and back conditions in determining whether she could perform the offered duties, even though the Office had accepted the hip condition as a consequential condition of appellant's employment injuries and the Office had received reports that she had a herniated L4-5 disc prior to the job offer issued to appellant. The Office has, therefore, not established that the job offered to her was suitable.

CONCLUSION

The Office failed to establish that the job offered to appellant was suitable, taking into account not only her bilateral knee conditions, but also her accepted hip condition and her concurrent back condition and the job restrictions given by Dr. Belich.

⁶ *Janice S. Hedges*, 50 ECAB 379, 381 (2001).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 21, 2003 is reversed.

Issued: October 25, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member