United States Department of Labor
Employees' Compensation Appeals Board

EVELYN D. ANTLE, Appellant	)	
and	)	**Docket No. 04-1292**
	)	**Issued: October 8, 2004**
U.S. POSTAL SERVICE, POST OFFICE, St. Petersburg, FL, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On April 19, 2004 appellant filed a timely appeal of an Office of Workers' Compensation Programs' decision dated March 16, 2004, terminating appellant's compensation effective March 20, 2004 on the grounds that she refused an offer of suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits of the claim.

ISSUE

The issue is whether the Office properly terminated appellant's compensation effective March 20, 2004 on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On November 3, 1990 appellant, then a 40-year-old letter carrier, filed an occupational disease claim for compensation (Form CA-2) alleging that her job duties had aggravated her right hip condition. The Office accepted the claim for permanent aggravation of degenerative joint disease in the right hip. Appellant returned to work in a part-time light-duty position and

stopped working on May 30, 2000. She underwent right total hip replacement surgery in June 2000.

In a report dated February 15, 2002, Dr. Marc Reiskind, a treating physiatrist, indicated that appellant could return to work at 4 hours per day with restrictions such as 10 pounds lifting and no crawling or stooping. The Office prepared a statement of accepted facts and referred appellant, along with the medical records, to Dr. Adam Bright, an orthopedic surgeon. In a report dated July 16, 2002, Dr. Bright opined that appellant was capable of working eight hours per day with limitations. In a work capacity evaluation (Form OWCP-5c) Dr. Bright limited appellant to 2 hours per day of standing and walking, 2 hours of lifting, 1 hour of pulling and pushing with a 10-pound restriction on lifting, pulling and pushing.

On August 8, 2002 the employing establishment offered appellant a job as a full-time modified retail sales/distribution clerk. The physical restrictions of the position were in accord with Dr. Bright's restrictions: 2 hours per day of standing and walking, lifting of no more than 10 pounds at 2 hours per day and 1 hour per day of pushing and pulling no more than 10 pounds.

By letter dated August 28, 2002, the Office advised appellant that it found the job offer was suitable. Appellant submitted a report dated August 28, 2002 from Dr. Walter Afield, a neurologist and psychiatrist, who provided a history and results on examination. Dr. Afield diagnosed a severe depressive reaction and stated that, from a psychiatric standpoint, appellant was totally disabled. In a report dated September 9, 2002, Dr. Thomas Mixa, an attending orthopedic surgeon, stated that appellant was cleared for secretarial work in an office setting, and should not be working in a mailroom or warehouse where she had to kneel, stoop or bend, lift heavy packages or repetitively sort mail. In a Form OWCP-5c of the same date, Dr. Mixa indicated that appellant could work eight hours with no pushing, pulling, lifting, squatting, kneeling or climbing.

The Office then referred appellant to Dr. Bala Rao, a neurologist and psychologist, who in a report dated October 28, 2002, provided a history and results on examination. He opined that, from a psychiatric viewpoint, appellant had no restrictions and could perform the modified-duty position. In a report of the same date, Dr. Afield opined that appellant remained depressed and was physically and emotionally unable to work eight hours per day.

The Office did not make any additional findings with respect to the offered position. By report dated February 20, 2003, Dr. Reiskind indicated that appellant continued to have pain and described her low back disability as moderate to severe. He diagnosed status post right hip replacement, functional leg length discrepancy and right femoral obturator neuropathy. On June 23, 2003 the Office amended the statement of accepted facts to indicate that an employing establishment investigation revealed pictures of appellant performing yard work and lifting containers and boxes in her garage. In a report received by the Office on July 28, 2003, Dr. Reiskind indicated that he had reviewed the investigative pictures and his listed work restrictions remained unchanged. Dr. Reiskind doubted that appellant had the endurance to be able to consistently perform activities allowing her to be gainfully employed.

By letter dated November 18, 2003, the Office advised appellant that a conflict in the medical evidence existed and she was referred to Dr. Joseph Sena, a Board-certified orthopedic

surgeon, to resolve the conflict.[1] In a report dated December 10, 2003, Dr. Sena provided a history and results on examination. He stated that "we are asked to evaluate [appellant's] hip only" and noted, "I would like further to evaluate her low back but we are not permitted to evaluate her back." Dr. Sena stated that there was no history of trauma and he did not believe her hip condition was causally related to work. He diagnosed post-traumatic arthritis unrelated to the work injury. Dr. Sena stated that he "[did] not feel that [appellant] is orthopedically contraindicated to work on a full-time light-duty basis" and he opined that appellant was capable of performing a light-duty job of modified retail sales distribution clerk. He also noted that appellant "has psychiatric problems, which are significant" and that her subjective complaints were exaggerated.

By letter dated January 12, 2004, the employing establishment offered appellant the position of modified processing clerk. The physical restrictions were the same as the modified retail sales clerk: 2 hours per day standing and walking, 2 hours lifting with a 10-pound restriction, 1 hour per day pushing and pulling of 10 pounds, with no squatting, kneeling or climbing.

The Office advised appellant by letter dated January 16, 2004 that it considered the offered position to be within her work capabilities. Appellant was advised to either accept the position or provide an explanation for refusal within 30 days. On January 26, 2004 the Office received a response from appellant rejecting the offered position, noting Dr. Mixa's September 9, 2002 work restrictions. In a report dated February 2, 2004, Dr. Afield stated that appellant was unable to work. Dr. Reiskind also submitted a brief note dated February 17, 2004 stating that appellant was unable to return to work.

In a letter dated February 26, 2004, the Office stated that it had considered the reasons provided by appellant and found them to be unacceptable. The Office notified appellant she had 15 days to accept the position or a final decision would be issued and no further reasons would be considered. By letter dated March 7, 2004, appellant stated that she was unable to accept the position as it was not medically suitable.

By decision dated March 16, 2004, the Office terminated appellant's compensation effective March 20, 2004 on the grounds that she refused an offer of suitable work. The Office determined that the weight of the medical evidence rested with Dr. Sena.

LEGAL PRECEDENT

5 U.S.C. § 8106(c) provides in pertinent part, "A partially disabled employee who … (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation." It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[2] To justify such a termination, the Office must show that the work offered was suitable.[3] An employee who refuses or neglects to work

[1] A memorandum of referral indicated the conflict was between Dr. Bright and Dr. Afield.

[2] *Henry P. Gilmore*, 46 ECAB 709 (1995).

[3] *John E. Lemker*, 45 ECAB 258 (1993).

after suitable work has been offered to her has the burden of showing that such refusal to work was justified.[4]

Section 8123(a) of the Federal Employees' Compensation Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[5] When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.[6]

ANALYSIS

In the present case, the Office declared a conflict in the medical evidence existed and the case was referred to Dr. Sena, an orthopedic surgeon. With respect to appellant's ability to perform the offered position, the Board finds that Dr. Sena did not resolve all of the conflicting medical issues presented. With respect to an orthopedic disability, a second opinion referral physician, Dr. Bright, opined in a July 16, 2002 report that appellant could work eight hours and he provided work restrictions that became the basis for the physical restrictions provided in the offered position. Appellant's orthopedic surgeon, Dr. Mixa, provided work restrictions that were outside the offered position. For example, Dr. Mixa reported no lifting, pulling or pushing in a September 9, 2002 work restriction evaluation. A treating physiatrist, Dr. Reiskind, indicated on July 28, 2003 that he did not believe appellant could be gainfully employed.

In addition, appellant submitted reports from Dr. Afield, who opined that appellant was totally disabled due to a depressive disorder. The Office further developed the issue and sent appellant to Dr. Rao, who opined in an October 28, 2002 report that appellant was not psychiatrically disabled and could perform the position of modified retail sales/distribution clerk.

The Board finds that Dr. Sena's report does not resolve the issue of whether the offered position was medically suitable. The record was in conflict as to a psychiatric disability, and Dr. Sena, an orthopedic surgeon, offers no opinion on the issue. The Office developed the issue of a psychiatric disability without resolving the issue. Dr. Afield continued to opine that appellant was disabled due to a psychiatric condition, and his opinion was in conflict with Dr. Rao. The Office did not properly resolve the issue of whether the offered position was medically suitable as to a psychiatric condition.

With respect to orthopedic restrictions, Dr. Sena appeared to limit his opinion to the hip. He noted that he would like to evaluate the back but felt he was precluded from doing so. It is well established that the issue of whether an offered position is medically suitable is not limited to the accepted work injury.[7] The issue is whether there are any medical conditions that preclude

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[4] *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.517(a).

[5] *Robert W. Blaine*, 42 ECAB 474 (1991); 5 U.S.C. § 8123(a).

[6] *William C. Bush*, 40 ECAB 1064 (1989).

[7] *See Janice S. Hodges*, 52 ECAB 379 (2001); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (December 1995).

a claimant from performing the duties of the offered position. Dr. Sena was not precluded from considering the back or other potentially disabling condition. Although Dr. Sena stated that appellant was not orthopedically disabled from performing the job duties, it appeared that he was limiting his opinion to the hip condition.

Accordingly, the Board finds that the medical evidence is not sufficient to establish whether the offered position was medically suitable. The record does not contain medical evidence that properly considers all of the diagnosed conditions and provides reasoned opinions that the offered position was medically suitable. It is the Office's burden of proof to establish the suitability of the offered position. The medical evidence of record is not sufficient to meet that burden in this case.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation on the grounds that she refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 16, 2004 is reversed.

Issued: October 8, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member