United States Department of Labor
Employees' Compensation Appeals Board

DOROTHY N. JOHNSON, Appellant	)	
and	)	**Docket No. 05-916**
	)	**Issued: December 15, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Coppell, TX, Employer	)	

Appearances:
Dorothy N. Johnson, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge

JURISDICTION

On March 10, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated June 7, July 22 and September 13, 2004 terminating her compensation benefits on the grounds that she refused an offer of suitable work and a nonmerit decision dated December 15, 2004 denying her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, this Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation benefits effective July 11, 2004 on the grounds that she refused an offer of suitable employment; and (2) whether the Office properly refused to reopen appellant's claim for a decision on the merits of her claim.

FACTUAL HISTORY

On May 8, 2000 appellant, then a 45-year-old mail clerk, filed an occupational injury claim that was accepted for left cubical tunnel syndrome.[1] Appellant was placed on the periodic rolls.

The Office continued to develop the claim. In a November 25, 2003 report, Dr. R. Robert Ippolito, a treating physician,[2] opined that appellant had reached maximum medical improvement and that she could return to work with restrictions.

On January 12, 2004 the employing establishment made a limited-duty job offer to appellant. By letter dated March 25, 2004, the Office advised appellant that it found the position of modified clerk suitable and in accordance with her medical limitations as provided by her treating physician. The Office confirmed that the position remained available to appellant and that she had 30 days to either report to duty or provide a written explanation of her reasons for refusing to do so. In response, appellant submitted a letter from the union on her behalf declining the offered position on the grounds that she was suffering from pneumonia, a condition unrelated to her employment, and was unable to perform the job as offered.

By letter dated May 10, 2004, the Office advised appellant that she had failed to provide valid reasons for refusing to accept the limited-duty job and that if she had not accepted the position and arranged for a report date within 15 days of the date of the letter, her entitlement to wage-loss and schedule award benefits would be terminated.

On May 25, 2004 appellant accepted the proposed limited-duty position. However, she did not return to work.

By decision dated June 7, 2004, the Office terminated appellant's compensation benefits effective July 11, 2004 on the grounds that she refused an offer of suitable work.

By letter dated June 21, 2004, appellant requested reconsideration of the Office's June 7, 2004 decision. In support of her request, appellant submitted a June 10, 2004 letter from Dr. Quos-Hung Tran, a Board-certified psychiatrist, reflecting diagnoses of panic disorder with agoraphobia and major depression and his opinion that she was disabled from work at that time. In an April 23, 2004 work excuse form, Dr. Michael Marshall, a Board-certified internist, indicated that appellant was unable to return to work until May 3, 2004 due to pneumonia. In a May 18, 2004 work release form, Dr. Ippolito stated that appellant was unable to work from May 18 through 25, 2004. In a May 20, 2004 return to work form, Dr. Tran requested that appellant be excused from work until June 20, 2004. In an illegibly dated return to work form,

[1] Appellant filed an occupational injury claim (A16-0217865) on January 6, 1993 that was accepted for carpal tunnel syndrome of the right hand, aggravation of left ganglion cyst and left ganglion cyst excision. Appellant also filed an occupational injury claim on October 30, 1998 that was accepted for aggravation of left wrist ganglion cyst. (A16-325174) During the development of the instant claim, the Office consolidated all three cases under A16-0217865 in order to ensure proper management of the related cases.

[2] Although Dr. Ippolito represents that he is a Diplomate on the American Board of Plastic Surgery, his credentials cannot be verified.

Dr. Marshall indicated that appellant was incapacitated due to pneumonia from April 21 through May 19, 2004. By decision dated July 22, 2004, the Office denied modification of its June 7, 2004 decision.

On August 6, 2004 appellant again requested reconsideration, stating that she had intended to return to work when she accepted the offered position on May 25, 2004, but that she developed pneumonia and was therefore unable to do so. She also claimed that her condition had worsened to include the diagnosis of emphysema and that she also suffered from panic disorder and major depression. Appellant contended that the job offer should be considered unsuitable under the Federal Employees' Compensation Act, in that she suffered from a disabling condition that arose after the compensable injury. She submitted medical reports, including a July 7, 2004 return to work certificate from Dr. Marshall providing a diagnosis of persistent cough and pneumonia and indicating that appellant would be able to return to work on July 20, 2004. In a return to work slip, Dr. Stephen F. Mueller, a treating physician, provided a diagnosis of acute chronic cough and stated that appellant should remain off work from July 20 through August 3, 2004.

In a merit decision dated September 13, 2004, the Office denied appellant's request to modify its June 7, 2004 decision. The Office determined that the fact that appellant developed pneumonia towards the end of April 2004 did not preclude her from returning to work in January, February, March or April and that she could have returned to work and taken sick leave. The Office also found that there was no medical reason as to why her emotional condition disabled her from employment.

By letter dated September 24, 2004, appellant again requested reconsideration of the Office's June 7, 2004 decision, reiterating her contention that the offered job should be considered unsuitable because she suffered from a disabling condition that arose after the compensable injury. By decision dated December 15, 2004, the Office denied appellant's request for reconsideration, finding that she neither raised substantive legal questions nor included new and relevant evidence.

By letter dated February 18, 2005, appellant again requested reconsideration of the Office's June 7, 2004 decision.[3]

LEGAL PRECEDENT -- ISSUE 1

It is well settled that, once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[4] Section 8106(c) of the Act[5] provides that

[3] The Board notes that appellant submitted additional evidence after the Office rendered its December 15, 2004 demission, the evidence represents new evidence which cannot be considered by the Board. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952). Appellant may submit this evidence to the Office, together with a formal request for reconsideration, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2).

[4] *See Melvin James*, 56 ECAB ___ (Docket No. 03-2140, issued March 25, 2004).

[5] 5 U.S.C. § 8106(c)(2).

a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee is not entitled to compensation. Section 10.516 of the applicable regulations state:

> "[The Office] shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter [the Office's] finding of suitability. If the employee presents such reasons, and [the Office] determines that the reasons are unacceptable, it will notify the employee of that determination and that he or she has 15 days in which to accept the offered work without penalty. At that point in time, [the Office's] notification need not state the reasons for finding that the employee's reasons are not acceptable."[6]

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.[7] In other words, to justify termination of 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 by appellant was suitable.[8]

Once the Office establishes that the work offered is suitable, the burden shifts to the employee who refuses to work to show that the refusal or failure to work was reasonable or justified.[9] The determination of whether an employee is physically capable of performing a modified assignment is a medical question that must be resolved by medical evidence.[10] Office procedures state that acceptable reasons for refusing an offered position include medical evidence of inability to do the work.[11] Furthermore, if medical reports document a disabling condition which has arisen since the compensable injury, then the job will be considered unsuitable.[12]

Once a suitable work position has been accepted by a claimant, she must report to work or submit medical evidence substantiating that she was unable to work on the start date or

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[6] 20 C.F.R. § 10.516.

[7] *See Linda Hilton***,** 52 ECAB 476 (2001).

[8] *Id.; see also Glen L. Sinclair*, 36 ECAB 664 (1985).

[9] 20 C.F.R. § 10.517(a).

[10] *See Robert Dickerson*, 46 ECAB 1002 (1995).

[11] *Id.*

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814(b)(4) (December 1993). *See Susan L. Dunnigan*, 49 ECAB 267 (1998). (If medical records in the file document a condition which has arisen since the compensable injury, and this condition disables the claimant from the offered job, then the job will be considered unsuitable, even if the subsequently acquired condition is not job related.)

another acceptable reason for failure to report to work. If no such reason is offered, the claimant has neglected to work after suitable work has been procured for her.[13]

ANALYSIS -- ISSUE 1

The Board finds that the Office failed to meet its burden of proving that the modified-duty job it offered appellant was suitable, in that it did not properly consider her subsequently acquired condition of pneumonia prior to terminating her compensation benefits.

Based on Dr. Ippolito's November 25, 2003 report concluding that appellant had reached maximum medical improvement with regard to her accepted condition and that she could return to work with restrictions, the employing establishment made a limited-duty job offer to appellant. The Office advised appellant that it found the position of modified clerk suitable and in accordance with her medical limitations as provided by her treating physician. By letter dated May 10, 2004, the Office notified appellant that she had 15 days to accept the modified position and to make arrangements for a report date. On May 25, 2004 appellant accepted the job offer. However, she never returned to work. The Office terminated appellant's benefits on June 7, 2004.

Once the suitable work offer was made to appellant, it became incumbent upon her to provide medical evidence substantiating that she was unable to report to work during the period of time between the job offer and the date that the Office terminated benefits. Dr. Ippolito opined that appellant was unable to work due to pneumonia from May 18 through 25, 2004, the date appellant accepted the offered position. Dr. Marshall provided a diagnosis of persistent coughing and pneumonia and indicated that appellant would be able to return to work on July 20, 2004. On June 20, 2004 Dr. Mueller diagnosed acute chronic cough and stated that appellant should remain off work from July 20 through August 30, 2004. The medical evidence of record does contain probative medical evidence that appellant suffered from the condition of pneumonia before and after May 25, 2004, the date she accepted the limited-duty job offer.[14] The Office found that appellant's conditions were not work related and that there was no evidence to support her inability to perform the duties of the offered position. It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of the suitability of an offered position.[15] Therefore, the Office had a duty to consider whether appellant's newly diagnosed condition of pneumonia prevented her from performing the duties of the modified position. The Board finds that the Office violated its duty by using an improper standard in terminating appellant's compensation benefits.

[13] *See Shirley B. Livingston*, 42 ECAB 855 (1991).

[14] Appellant also submitted a June 10, 2004 letter from Dr. Tran reflecting his opinion that she was disabled from work at that time due to a panic disorder and major depression.

[15] *See Richard P. Cortes*, 56 ECAB ___ (Docket No. 04-1561, issued December 21, 2004). *See also Gayle Harris*, 52 ECAB 319 (2001).

In *Shirley B. Livingston*,[16] the Board found that the Office had properly terminated the claimant's compensation benefits because she had not provided any medical evidence to substantiate that she was unable to report to work due to illness, after having accepted an offer of suitable employment. The instant case is distinguishable from *Livingston*. Appellant did not submit a narrative report outlining the chronology of her newly diagnosed conditions. However, she provided substantial documentation that she suffered from the condition of pneumonia during the period April through August 2004, as well as probative medical evidence that she was disabled around the time she was to report to her modified position. The Office should have developed the evidence presented and considered whether appellant's newly diagnosed condition rendered the modified position unsuitable as of June 7, 2004.[17]

Proceedings by the Office are not adversarial in nature, and the Office is not a disinterested arbiter. In a case where the Office proceeds to develop the evidence and to procure medical evidence, it must do so in a fair and impartial manner.[18] The failure of the Office to consider appellant's additional argument that she was incapacitated by pneumonia prior to terminating her compensation benefits is reversible error.[19]

CONCLUSION

The Board finds that the Office has not met its burden of proof to terminate appellant's compensation benefits effective July 11, 2004 for refusing a suitable job offer. In light of the Board's decision regarding the first issue, the issue of whether the Office properly refused to reopen appellant's claim for a decision on the merits is moot.

[16] *Supra* note 13.

[17] The Board notes that the evidence of record does not support that appellant was disabled as a result of depression or panic disorder at the time she was scheduled to report to her modified job. Dr. Tran's June 10, 2004 letter reflected that she suffered from panic disorder with agoraphobia and major depression and that, accordingly, she was disabled from work at that time. Dr. Tran did not explain why appellant was unable to perform her duties as a result of her diagnosed condition. An opinion without such explanation lacks probative value. *See Bernard Snowden*, 49 ECAB 144 (1997).

[18] *Walter A. Fundinger, Jr.*, 37 ECAB 200 (1985).

[19] *See Melvin James*, *supra* note 4.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 13, July 22 and June 7, 2004 are reversed.

Issued: December 15, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board