

evaluation on November 17 to 19, 1998; the physical restrictions reported included 10 pounds of lifting and 3 hours of sitting per day.

The Office referred appellant to Dr. Edmund Casper, a neuropsychiatrist, for evaluation. In a report dated January 11, 2000, Dr. Casper provided a history and results on examination. He diagnosed chronic, severe major depression, and opined that appellant was unable to perform her date-of-injury job. Dr. Casper completed a work restriction evaluation (OWCP-5) indicating that appellant could work four hours per day; he indicated that appellant needed intensive therapy in order to return to work and should be assigned to a different supervisor.

The employing establishment offered appellant a position as a modified general clerk at four hours per day beginning on June 12, 2000. In a report dated May 24, 2000, Dr. John Graves, a psychiatrist, provided a history and opined that appellant could not return to any position with the employing establishment, as she would most likely experience a return of her depressive symptoms. On May 26, 2000 appellant rejected the offered position.

The Office found that a conflict existed between Dr. Casper and Dr. Graves. Appellant was referred to Dr. Burt S. Furmansky, a Board-certified psychiatrist and neurologist, as an impartial medical specialist. In a report dated May 29, 2001, Dr. Furmansky provided a history and reviewed the medical evidence. Dr. Furmansky diagnosed major depressive disorder, in remission on medication, obesity, cardiac failure and hypertension. With respect to whether appellant could return to work at the employing establishment, Dr. Furmansky opined that appellant “is not able to return to her date-of-injury job because of her physical condition. In my opinion, she is able to return to [the employing establishment] to perform sedentary work duties.” He further opined that appellant would not be emotionally retraumatized by accepting a job with the employing establishment, as she did not have post-traumatic stress disorder, nor was she exposed to a catastrophic event. Dr. Furmansky stated that, from a psychiatric perspective, appellant would be capable of performing eight hours per day after a gradual reintroduction at four hours per day for four weeks, with progression to six hours for another four weeks. He stated, “I think it is critical to evaluate from a physical perspective that [appellant] would be capable of working eight hours per day and to determine her physical restrictions.” In a work restriction evaluation (OWCP-5a), Dr. Furmansky responded to a question as to whether other medical factors need to be considered in the identification of a position for appellant by stating, “chronic heart disease, [history] of MI [myocardial infarction], hypertension [and] past [history] of hypokalemia as a side effect of lasix.” He also stated, “Her physical limitations require assessment [and] if she is able to perform sedentary work it is my opinion she can gradually be phased back to work.”

On August 31, 2001 the employing establishment offered appellant a modified clerk position at four hours per day for the initial four weeks, six hours per day for the next four weeks and then eight hours per day. The job duties indicated that appellant would work the front desk, answer telephones and direct questions to the appropriate department. The physical requirements included four hours of sitting and simple grasping.

By letter dated October 10, 2001, the Office advised appellant that it found the offered position to be suitable. The Office noted provisions of 5 U.S.C. § 8106(c)(2) of the Federal Employees’ Compensation Act, and advised appellant she had 30 days to accept the position or

provide reasons for refusing the position. In a letter dated October 31, 2001, appellant indicated that she would not accept the position as it was not suitable. Appellant submitted an October 10, 2001 report from Dr. Graves, who noted that appellant had undergone a functional capacity evaluation in November 1998. Dr. Graves stated that appellant “has been physically restricted according to the parameters summarized in the functional capacity evaluation described above. She is vocationally restricted from ever returning to work of any kind in [the employing establishment]. I would expect that these restrictions would be lifelong.”

In a letter dated November 19, 2001, the Office advised appellant that her reasons for refusing the position were not justified. The Office stated that appellant had an additional 15 days to accept the position or the provisions of 5 U.S.C. § 8106(c) would be enforced.

By decision dated December 6, 2001, the Office terminated appellant’s compensation effective December 30, 2001 on the grounds that she refused an offer of suitable work.

Appellant requested a hearing, which was held on January 15, 2003. By decision dated May 27, 2003, an Office hearing representative affirmed the December 6, 2001 decision.

LEGAL PRECEDENT

Section 8106(c) of the Act 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.¹ To justify such a termination, the Office must show that the work offered was suitable.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

ANALYSIS

The Office in this case found that the offered position of modified clerk was medically suitable based on the report of Dr. Furmansky. In this regard, the Board notes that the Office had found a conflict in the medical evidence and selected Dr. Furmansky as an impartial medical specialist.⁴ There was a conflict with respect to appellant’s ability to return to work at the employing establishment based on a psychiatric condition; Dr. Graves found appellant could not return to the employing establishment, while the second opinion physician, Dr. Casper, appeared to indicate that appellant could work at four hours per day if she had a different supervisor. Dr. Furmansky did provide a reasoned opinion that appellant would not be retraumatized by

¹ *Henry P. Gilmore*, 46 ECAB 709 (1995).

² *John E. Lemker*, 45 ECAB 258 (1993).

³ *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.517(a).

⁴ 5 U.S.C. § 8123(a) 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.

returning to work at the employing establishment. He noted that there was no post-traumatic stress disorder or catastrophic event that would trigger a response. Therefore the weight of the evidence indicated that appellant was not precluded by a psychiatric condition from returning to the employing establishment.⁵

The issue in this case, however, is whether the offered position was medically suitable. While Dr. Furmansky may represent the weight of the evidence with respect to psychiatric work restrictions, he did not provide a reasoned opinion as to physical work restrictions. The Office must consider both the accepted medical conditions as well as other existing conditions in determining whether an offered position is suitable.⁶ Dr. Furmansky noted that appellant had physical conditions that included heart disease, myocardial infarction and hypertension. The Office found that the offered position was within Dr. Furmansky's work restrictions, but Dr. Furmansky did not discuss specific physical work restrictions. Although he briefly referred to appellant's ability to work sedentary duties, Dr. Furmansky also stated in his narrative report that it was critical that appellant be evaluated to determine her physical restrictions. In his OWCP-5a, he stated that appellant's physical limitations needed to be assessed, and if appellant could work sedentary duties, she could be returned to work initially at four hours per day.

The Board also notes that attending psychiatrist, Dr. Graves, referred to the functional capacity evaluation from November 1998, and in that evaluation there were limitations on sitting that would not comply with the offered position. The Office did not secure a probative medical report that adequately discussed appellant's physical conditions and provided specific physical limitations. Without such evidence, the Office cannot properly determine whether the offered position was medically suitable in this case. It is the Office's burden of proof to establish that the offered position was suitable, and in this case the medical evidence of record is insufficient with respect to whether appellant was physically capable of performing the job duties. The Board finds the Office did not meet its burden of proof to terminate compensation pursuant to 5 U.S.C. § 8106(c).

CONCLUSION

The Board finds that the Office did not meet its burden of proof in this case as the medical evidence does not include a report that adequately addresses appellant's physical condition and shows that the offered position was suitable.

⁵ An opinion of an impartial medical specialist that is well reasoned and based on a complete background is entitled to special weight. *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

⁶ See *Janice R. Hodges*, 52 ECAB 379 (2001).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 27, 2003 is reversed.

Issued: March 4, 2005
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member