United States Department of Labor
Employees' Compensation Appeals Board

MELISSA I. McROY, Appellant	)	
and	)	**Docket No. 05-121**
	)	**Issued: May 17, 2005**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Leavenworth, KS, Employer	)	

Appearances:
Melissa I. McRoy, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On October 12, 2004 appellant filed a timely appeal from an April 6, 2004 nonmerit decision of the Office of Workers' Compensation Programs, denying her request for reconsideration and a December 9, 2003 decision, which terminated her compensation on the grounds that she refused an offer of suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerit and merit decisions.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation effective December 9, 2003, on the grounds that she refused an offer of suitable work; and (2) whether the Office properly refused to reopen appellant's claim for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On January 1, 2002 appellant, then a 22-year-old food service worker, filed a traumatic injury claim alleging that on December 31, 2001 she hurt her lower back while placing a box onto a cart. She stopped work on the date of injury. By letter dated February 6, 2002, the Office accepted the claim for a low back strain.

Appellant underwent physical therapy from January 10 through February 28, 2002. In a February 19, 2002 duty status report, Dr. S.R. Reddy Katta, an attending Board-certified physiatrist, stated that appellant would be released to return to work on March 1, 2002 with certain physical restrictions. Appellant returned to light-duty work on March 2, 2002 for four hours a day with physical restrictions prescribed by Dr. Katta.

On April 7, 2002 appellant was involved in a nonwork-related motor vehicle accident in which she hurt her right knee and ankle. She stopped work after the accident.

On August 29, 2002 Dr. Katta stated that appellant had a lumbar sprain with an aggravated right knee and ankle sprain. He stated that she could return to light-duty work 4 hours a day and that she could not lift, pull or push more than 5 to 10 pounds for 6 weeks.

By letter dated January 9, 2003, the Office referred appellant together with the case record, a statement of accepted facts and a list of questions to be addressed to Dr. Dale D. Dalenberg, a Board-certified orthopedic surgeon, for a second opinion medical examination. He submitted a March 3, 2003 medical report in which he reviewed appellant's medical records and the statement of accepted facts. Dr. Dalenberg provided a history of the December 31, 2001 employment injury and reviewed her medical background. He noted appellant's April 7, 2002 motor vehicle accident and resultant right knee and ankle pain. Dr. Dalenberg reported appellant's complaints of low back symptoms and his findings on physical examination. He noted the normal findings of a January 2, 2002 x-ray of appellant's lumbar spine and the results of a January 21, 2003 magnetic resonance imaging (MRI) scan, which demonstrated derangement of the L5-S1 disc. Dr. Dalenberg provided a case summary. Regarding appellant's treatment plan, Dr. Dalenberg stated that she should have an organized work hardening therapy program followed by home exercise program and appropriate work restrictions. He did not recommend surgery on the L5-S1 disc herniation because appellant did not have good clinical prognosticators for a good result.

In response to the Office's questions, Dr. Dalenberg stated that appellant's employment-related back condition was still active and causing symptoms. He found that she sustained a deranged L5-S1 disc with disc herniation due to the accepted employment injury. He believed that, while it was difficult to pinpoint the MRI scan finding one year later to the employment injury and appellant was asymptomatic regarding her back prior to the injury based on the history she provided, the January 2003 MRI scan would explain the reason why her symptoms had not resolved in that period of time. Dr. Dalenberg stated that the motor vehicle accident exacerbated the pain syndrome associated with the L5-S1 disc derangement that resulted from the December 31, 2001 employment injury. He also stated that the accident added the symptoms of right knee, shin and ankle pain and the use of a cane to appellant's symptom complex. Dr. Dalenberg related that the December 31, 2001 employment injury caused derangement of the

L5-S1 disc with a prolapsed or contained extrusion of the L5-S1 disc. He diagnosed a deranged L5-S1 disc which was giving rise to protracted mechanical or discogenic back pain symptoms. He noted, however, that appellant did not have classic symptoms of disc herniation and that she did not have a left S1 radiculopathy. He concluded that she was unable to perform the duties of her date-of-injury job as a food service worker. In an accompanying work capacity evaluation dated March 3, 2003, Dr. Dalenberg indicated that appellant could work eight hours a day with certain physical limitations. She was limited to walking, standing and operating a motor vehicle up to 2 hours, pushing, pulling, lifting and squatting no more than 20 pounds up to 2 hours and kneeling up to 2 hours. Appellant was not allowed to twist or climb.

By letter dated March 13, 2003, the Office requested that Dr. Katta provide whether he agreed with Dr. Dalenberg's recommended treatment and restrictions. The Office advised appellant in a letter of the same date that the acceptance of her claim had been expanded to include a herniated disc at L5-S1. The Office further advised that she was authorized to undergo work hardening therapy as recommended by Dr. Dalenberg.

In a letter dated March 19, 2003, the employing establishment advised appellant to return to work on Tuesday, March 25, 2003 based on Dr. Dalenberg's report. The employing establishment further advised that she would be assigned job duties within her physical limitations. On March 25, 2003 the employing establishment informed the Office that appellant was pregnant and that she had been placed on bed rest. The Office responded that the employing establishment should proceed with a job offer to appellant. By letter dated April 2, 2003, the employing establishment offered appellant the position of telephone operator.

In a March 28, 2003 letter, Dr. Katta agreed with Dr. Dalenberg's treatment recommendations although he expressed concern about appellant's ability to handle 20 pounds of weight. He stated that appellant could start at 10 to 15 pounds and then gradually increase as she could tolerate. He also stated that there was no need for a work hardening program as it could cause more pain. Dr. Katta indicated that appellant could return to light-duty work based on his March 18, 2003 recommendation[1] which required no lifting, pulling or pushing more than 10 to 15 pounds. He further indicated that, if a work hardening program was insisted, then he did not have any hesitation but, he was afraid it might cause more discomfort for appellant's knee, ankle and back, which might prolong her return to work. Dr. Katta concluded that, if the employing establishment agreed, he would be glad to let appellant return to work as soon as next week.

On April 21, 2003 the employing establishment advised the Office that appellant had rejected the job offer and requested that the Office make a ruling on the suitability of the offer. A description of the offered position provided, among other things, the physical requirements which included sitting, reaching, keyboarding, viewing computer screens for an extended period of time and short periods of stooping, walking, bending and lifting less than 20 pounds. In an internal memorandum dated May 7, 2003, the employing establishment clarified the description of the offered position by indicating that the physical demands required minimal lifting of log books that weighed approximately 10 pounds. By letter dated May 12, 2003, the employing establishment reissued the offer of the position of telephone operator to reflect the change that

[1] The Board notes that the case record does not contain Dr. Katta's March 18, 2003 recommendation.

appellant was required to only lift no more than 10 pounds. The employing establishment advised the Office that it had reissued the offer of the position of telephone operator in a May 28, 2003 letter.

By letter dated June 12, 2003, the Office advised appellant that the offered position was suitable and provided her with her procedural rights pursuant to 5 U.S.C. § 8106(c). On August 21, 2003 the Office informed appellant that the offered position was still available and provided her 30 days to accept or reject the position. She did not respond.

By letter dated November 4, 2003, the Office advised appellant that she had not responded to its August 21, 2003 letter and afforded her 15 days to accept the offered position or be subjected to termination of compensation benefits. On November 18, 2003 she rejected the employing establishment's job offer.

On December 9, 2003 the Office issued a decision terminating appellant's compensation effective that date on the grounds that she refused an offer of suitable work. The Office noted that she did not provide any reasons for refusing the offered position and that the position was based on the restrictions outlined by Dr. Dalenberg and Dr. Katta. The Office noted that the employing establishment verified that the offered position was still available to appellant.

On January 27, 2004 appellant requested reconsideration. She submitted duplicate copies of the employing establishment's May 7, 2003 internal memorandum and May 12 and 28, 2003 letters, Dr. Dalenberg's March 3, 2003 medical report and work capacity evaluation and Dr. Katta's March 28, 2003 letter.

In an April 6, 2004 decision, the Office denied reconsideration of her claim on the grounds that the evidence submitted was repetitious in nature.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation, including cases in which the Office terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work.[2]

Section 8106(c) of the Federal Employees' Compensation Act[3] provides that 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 10.517 of the applicable regulation[4] provides that an employee who refuses or neglects to work after suitable work has been offered or secure for the employee, has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to

[2] 5 U.S.C. § 8106(c); *Henry W. Sheperd, III*, 48 ECAB 382, 385 (1997); *Shirley B. Livingston*, 42 ECAB 855, 861 (1991).

[3] 5 U.S.C. § 8106(c)(2).

[4] 20 C.F.R. § 10.517(a).

compensation. To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[5]

ANALYSIS -- ISSUE 1

Dr. Dalenberg, an Office referral physician, found that appellant was not capable of performing her usual work duties as a food service worker but could return to work for eight hours a day as of March 3, 2003 with certain physical restrictions. She was limited to walking, standing and operating a motor vehicle up to 2 hours, pushing, pulling, lifting and squatting no more than 20 pounds up to 2 hours and kneeling up to 2 hours. Appellant was not allowed to twist or climb. Dr. Katta, her attending physician, reviewed Dr. Dalenberg's findings and agreed that appellant participate in a work hardening program. He expressed concern about her ability to lift 20 pounds. He suggested that appellant start out lifting 10 to 15 pounds and gradually increase the weight as she could tolerate. Dr. Katta indicated that appellant could return to light-duty work if she avoided lifting, pulling or pushing more than 10 to 15 pounds. He stated that he did not have any hesitation with appellant's participation in a work hardening program if insisted and that she could return to work within a week if the employing establishment agreed.

The physical requirements of the offered telephone operator position involved sitting, reaching, keyboarding and viewing computer screens for an extended period of time and short periods of stooping, walking, bending and lifting no more than 10 pounds. As the position is within the restrictions set forth by Dr. Dalenberg and Dr. Katta, the Board finds that the offered position was medically suitable to appellant's physical limitations.

On August 21, 2003 the Office informed appellant that the telephone operator position was suitable and informed her of the penalty provision of section 8106 of the Act. It provided 30 days to accept the position. She did not respond. The Office properly informed appellant that she had 15 days to accept the offered position or be subjected to termination of compensation benefits. On November 18, 2003 she rejected the offered position without providing any explanation why she did not accept the job offer. Appellant refused the offered position and the Office properly followed its procedures. The Board finds that the Office properly found that she refused an offer of suitable work on December 9, 2003.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128 of the Act,[6] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.[7] To be entitled to a merit review of an Office decision

[5] *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

[6] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[7] 20 C.F.R. § 10.606(b)(1)-(2).

denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[8] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.

ANALYSIS -- ISSUE 2

In this case, the Office terminated appellant's compensation on the grounds that she refused to accept an offer of suitable work. Appellant disagreed with this decision and requested reconsideration on January 27, 2004. In support of her request, appellant submitted duplicate copies of the employing establishment's May 7, 2003 internal memorandum clarifying the lifting requirement of the offered position, May 12, 2003 letter reissuing its job offer and May 28, 2003 letter advising the Office that the offered position had been reissued and requesting a suitability determination, Dr. Dalenberg's March 3, 2003 medical report and work capacity evaluation and Dr. Katta's March 28, 2003 letter. The Board has held that the submission of evidence or argument which repeats or duplicates that already in the case record does not constitute a basis for reopening a case.[9] The documents submitted by appellant in support of her request for reconsideration were previously considered by the Office and, therefore, are duplicative of evidence already of record. As such, this evidence is insufficient to warrant further merit review of her claim.

Appellant has not shown that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. Further, she failed to submit relevant new and pertinent evidence not previously considered by the Office. As appellant did not meet any of the necessary regulatory requirements, the Board finds that she was not entitled to a merit review.[10]

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation effective December 9, 2003 on the grounds that she refused an offer of suitable work. The Board further finds that the Office properly refused to reopen appellant's claim for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

[8] *Id*. at § 10.607(a).

[9] *Edward W. Malaniak*, 51 ECAB 279 (2000).

[10] *See James E. Norris*, 52 ECAB 93 (2000).

ORDER

IT IS HEREBY ORDERED THAT the April 6, 2004 and December 9, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 17, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member