United States Department of Labor
Employees' Compensation Appeals Board

RENEE Y. RENDON, Appellant	)	
and	)	**Docket No. 05-318**
	)	**Issued: May 2, 2005**
U.S. POSTAL SERVICE, West Sacramento, CA, Employer	)	

Appearances:
Renee Y. Rendon, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On November 18, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated August 23, 2004 terminating her schedule award and compensation benefits on the grounds that she refused an offer of suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, this Board has jurisdiction over the merits of this case.

ISSUE

Whether the Office met its burden of proof to terminate appellant's schedule award and compensation benefits effective August 23, 2004 on the grounds that she refused an offer of suitable employment.

FACTUAL HISTORY

On December 26, 2000 appellant, then a 40-year-old mail carrier, filed a traumatic injury claim alleging that on December 22, 2000 she was rear-ended while delivering mail, injuring the left side of her head, her right knee, back, left shoulder, chest and lower abdomen. The Office accepted appellant's claim for contusion of the right knee and chest, cervical strain and closed

head injury and later expanded the claim to include thoracic disc displacement. Appellant was originally treated by Dr. Donald Rossman,[1] who released her to work with restrictions on January 17, 2001. On February 1, 2002 appellant accepted a limited-duty job offer as a general office worker. Although she returned to full duty briefly on February 2, 2001, she eventually returned for four hours per day to a modified position that excluded overhead work, lifting more than five pounds with her left arm, squatting or kneeling on her right knee.

The Office continued to develop appellant's claim. She was treated by Dr. Gary T. Murata, a Board-certified orthopedic surgeon, who reduced appellant's work hours to two hours per day on May 1, 2002. In a May 14, 2002 report of a second opinion examination, Dr. Jerrold M. Sherman, a Board-certified orthopedic surgeon, opined that appellant suffered no residuals as a result of the December 22, 2000 work-related injury and that she was capable of working eight hours per day.

Following an independent medical examination, Dr. Howard Shortley, a Board-certified orthopedic surgeon, reported on September 12, 2002 that appellant continued to suffer residuals from her work-related injury and opined that appellant's physical limitations from the work-related disability included "no working over two hours daily, no lifting, pushing or pulling over five pounds with her upper extremity and no repetitive use of her left upper extremity above the shoulder level."[2]

In a report dated July 1, 2003, Dr. Murata opined that appellant's condition was permanent and stationary and that she was disabled from any type of work. He provided a diagnosis of costal chondritis and internal disc disruption at C6-7.3

Dr. Philip Wirganowicz, a Board-certified orthopedic surgeon, performed a second opinion examination and in a report dated September 16, 2003, stated that there was no objective evidence to support any ongoing residuals of appellant's cervical and thoracic sprains. He indicated that sensation was intact to light touch in all extremities; no muscular atrophy or asymmetry was noted; deep tendon reflexes were within normal limits and no upper motor neuron or nerve tension signs were noted; her gait was normal; and there was full range of motion of the cervical and lumbosacral spines. He opined that the period of total disability for appellant's job-related injury would have been approximately eight weeks and that she was capable of performing the duties of a video coding specialist, as described by appellant.

[1] Dr. Rossman's letterhead indicates that he was associated with Dameron Hospital, Occupational Health Services in Stockton, California; however, his credentials cannot be verified.

[2] The Board notes that the date on the first page of Dr. Shortley's report is July 13, 2000. However, in the body of the report, he refers to the fact that he obtained a history from appellant on September 12, 2002, the date the work capacity evaluation was signed by Dr. Shortley. Therefore, the Board presumes that the correct date of Dr. Shortley's report is September 12, 2002.

[3] The record reflects that on December 20, 2002 appellant filed a grievance objecting to the location of her limited-duty assignment, which was resolved by agreement on August 7, 2003.

In a letter dated September 30, 2003, Dr. Murata disagreed with Dr. Wirganowicz' September 16, 2003 report, stating that he did not believe that appellant could be gainfully employed. He indicated that she could not sit longer than a few minutes at a time and that her prescribed narcotics would negatively affect her mental status and render her a danger to herself or her coworkers.

In order to resolve the conflict in medical opinion, the Office referred appellant, along with the case record, to Dr. Kuldeep Sidhu, a Board-certified orthopedic surgeon, for an independent medical examination. Dr. Sidhu reviewed all medical evidence of record and conducted a 45-minute examination and interview of appellant. In a report dated November 24, 2003, he opined that there were no objective factors of disability and that appellant was able to return to work. Dr. Sidhu opined that appellant's diagnosed cervical strain, disc protrusion and contusion of the knee and hip had resolved. His examination revealed that appellant walked normally; her neck movements were normal and there was no localized tenderness around the cervical spine or trapezius muscle; the thoracic spine had no deformity and no tenderness; upper extremities had no neurological defects; the lumbar spine had no spasms and extension and lateral bending were normal; straight leg raise was 75 degrees and deep reflexes and sensation were normal; the left shoulder had no swelling but had diffuse tenderness; shoulder abduction was 105 degrees, forward elevation was 135 degrees; external rotation was 45 degrees and internal rotation was 60 degrees; left hip range of motion was normal; the left knee had no effusion, swelling or localized tenderness and range of motion was normal. Dr. Sidhu stated that appellant had subjective complaints of pain in her shoulder, neck and mid back, which he opined were out of proportion to any objective finding. In an accompanying work capacity evaluation dated November 20, 2003, Dr. Sidhu indicated that appellant had limitations as follows: she was able to work for 6 hours in a position requiring walking; 5 hours in a position requiring sitting; 3 hours in a position requiring standing or reaching; 1 hour in a position requiring pushing, pulling, kneeling or climbing; and 15 minutes in a position requiring lifting. He further recommended that appellant be placed in a job that required no twisting, bending, kneeling or squatting and no lifting, pulling or pushing more than 25 pounds.

On December 24, 2003 the Office issued a notice of proposed termination on the grounds that appellant was no longer disabled and was able to perform the duties of a video coding specialist. The notice advised appellant that she had 30 days in which to submit evidence or argument if she disagreed with the proposed action.[4]

[4] The Board notes that no final decision was issued by the Office regarding the December 24, 2003 notice of termination. *See* 20 U.S.C. § 501.2(c) (the Board has jurisdiction to consider and decide appeals from final decisions; there shall be no appeal with respect to any interlocutory matter disposed of during the pendency of the case). *See Roger W. Griffith*, 51 ECAB 491 (2000).

On March 29, 2004 the employing establishment made a limited-duty job offer to appellant. The position of modified city carrier accommodated all of the restrictions outlined by Dr. Sidhu.[5] On April 6, 2004 appellant rejected the limited-duty offer. In support of her rejection, appellant submitted a report dated April 1, 2004 signed by Dr. Jeff Jones, a Board-certified anesthesiologist, who had been treating her for pain management. Dr. Jones indicated that he was "skeptical that she can do this job" and recommended that she undergo a functional capacity evaluation "to actually determine if she is able to do these things."

By letter dated April 12, 2004, the Office advised appellant that it found the position of modified city carrier suitable and in accordance with her medical limitations as provided by Dr. Sidhu in his November 24, 2003 report. Appellant was advised that, because he was an independent medical adviser, his findings were found to carry the greater weight of the medical evidence. 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, she submitted a letter dated May 11, 2004, from Dr. Jones in which he stated that, in his subjective opinion, appellant "will not be able to do the job as a modified city carrier." He complained that he had not received a copy of Dr. Sidhu's report and stated that he was "strongly suspicious that Dr. Sidhu does not have significant experience in this type of disorder." Dr. Jones contended that, due to his honest uncertainties as to appellant's ability to function in the modified position and the "obvious" inexperience of Dr. Sidhu, a functional capacity evaluation was indicated in order to determine whether or not appellant could perform the duties of the job.

By letter dated May 18, 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 28, 2004 the Office provided appellant with forms designed to assist her physician in performing an evaluation of permanent impairment and requested that she deliver them to her doctor. By letter dated July 20, 2004, Dr. Jones responded that he was "not qualified to answer these questions" and asked that appellant be referred to a qualified medical examiner

[5] The work limitations of modified city carrier were outlined in the job description sent to appellant. The limitations included: sitting -- 5 hours/day, continuous; walking -- 8 hours/day, intermittent; lifting -- 15 minutes/hour/day, intermittent, up to 25 pounds; standing -- 3 hours/day, intermittent; no climbing; pushing -- 1 hour/day; pulling 1 hour/day; reaching above shoulder -- 3 hours/day; fine manipulation -- 8 hours/day, continuous; simple grasping -- 8 hours/day continuous; keying -- 5 hours/day, continuous; no driving; no twisting, bending, stooping, squatting or kneeling. Duties included casing and preparing mail for delivery; writing up second notices for certified letters and parcels; answering telephones; customer inquiries; filing; voyager card reconciliation reports; and clearing returning carriers of their accountable and keys.

for that purpose. The record reflects regular reports from Dr. Jones which document appellant's ongoing complaints of pain.[6]

By decision dated August 23, 2004, the Office terminated appellant's compensation benefits as of that date on the grounds that she refused an offer of suitable work.[7]

LEGAL PRECEDENT

It is well settled that, once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[8] Section 8106(c) of the Federal Employees' Compensation Act[9] 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 10.516 of the applicable regulations states:

> "[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."[10]

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.[11] In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2),

---

[6] The Board notes that on May 24, 2004 the Office made a preliminary determination that appellant had been overpaid in the amount of $28.68 for which she was without fault but that the collection process was terminated as of July 7, 2004.

The Board also notes that, effective June 13, 2004, appellant elected to receive retirement benefits in lieu of compensation benefits.

[7] Appellant submitted documents subsequent to the Office's August 23, 2004 final decision. The Board does not have jurisdiction to review this evidence for the first time on appeal as its review of a case is limited to the evidence in the case record, which was before the Office at the time of its final decision; *see* 20 C.F.R. § 501.2(c).

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

[9] 5 U.S.C. § 8106(c)(2).

[10] 20 C.F.R. § 10.516.

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

which is a penalty provision, the Office has the burden of showing that the work offered to and refused by appellant was suitable.[12]

When a case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical evidence, the opinion of such specialist if sufficiently well rationalized and based on a proper factual investigation must be given special weight.[13]

ANALYSIS

The Board finds that the Office properly terminated appellant's compensation under 5 U.S.C. § 8106(c)(2) for refusing an offer of suitable work.

On July 1, 2003 Dr. Murata opined that appellant was disabled from any type of work due to residuals of costal chondritis and internal disc disruption. In a second opinion report, Dr. Wirganowicz found that there was no objective evidence to support any ongoing residuals of appellant's diagnosed conditions and that she was capable of performing the duties of a video coding specialist. In a September 30, 2003 letter, Dr. Murata disagreed with Dr. Wirganowicz, stating that he did not believe that appellant could be gainfully employed in that she could not sit longer than a few minutes at a time and her prescribed narcotics would negatively affect her mental status and render her a danger to herself or her coworkers.

In order to resolve the conflict, the Office properly referred appellant to Dr. Sidhu, a Board-certified orthopedic surgeon, for an impartial medical examination. After reviewing all of the medical evidence of record and conducting a 45-minute examination and interview, Dr. Sidhu described the history of appellant's condition and his findings in detail and concluded that her diagnosed cervical strain, disc protrusion and contusion of the knee and hip had resolved. He found that there were no objective factors of disability and opined that appellant's subjective complaints of pain were out of proportion to any objective finding. Dr. Sidhu further concluded that appellant was able to return to work, provided that her job required no more than six hours walking; five hours sitting; three hours standing or reaching; or one hour pushing, pulling or climbing. He also recommended that she be restricted from twisting, bending, kneeling or squatting and from lifting, pulling or pushing more than 25 pounds. The Board finds that Dr. Sidhu's report was thorough and well rationalized.

On March 29, 2004 the employing establishment offered appellant the job of modified city carrier, a limited-duty position which accommodated all of the restrictions outlined by Dr. Sidhu. Relying on a letter from Dr. Jones reflecting his skepticism that she could perform the duties of the job, appellant rejected the limited-duty job offer on April 6, 2004. On April 12, 2004 the Office notified appellant that it had determined the position to be suitable and allowed her 30 days to present acceptable reasons for refusing the position.

By letter dated April 11, 2004, Dr. Jones opined that appellant would "not be able to do the job as a modified city carrier." However, he provided no rationale for his opinion. The

[12] *Id*. *See also Glen L. Sinclair*, 36 ECAB 664 (1985).

[13] *See Louis G. Psyras*, 39 ECAB 264 (1987);

Board has repeatedly held that an opinion unsupported by rationale is of little probative value.[14] Moreover Dr. Jones' opinion is equivocal. He did not opine to a reasonable degree of medical certainty that appellant had residuals from accepted work-related injuries which would prevent her from performing the limited-duty job. But rather he stated that he had "honest uncertainties" as to her ability to function in the position and questioned Dr. Sidhu's experience in "this type of disorder." Dr. Jones went so far as to indicate that he could not ascertain whether or not appellant could perform the duties of the job without further evaluation. The Board notes that, when the Office afforded him an opportunity to perform a functional capacity evaluation of appellant, Dr. Jones stated that he was not qualified to do so. The Board finds that his opinion is of limited probative value.

The Board finds that the report of the impartial medical specialist, which is well rationalized and based on a thorough review of the record and a comprehensive examination of appellant, is persuasive. Dr. Sidhu's report, which is entitled to special weight, represents the weight of the medical evidence and establishes that appellant was able to be gainfully employed, provided that the position accommodated his recommended restrictions. The Board further finds that the opinions of Dr. Murata and Dr. Jones are insufficient to overcome the special weight accorded to Dr. Sidhu's opinion.

The Office found the limited-duty job to be suitable in that it accommodated the restrictions delineated by Dr. Sidhu. The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence.[15] The record demonstrates that the physical capacity required for the modified carrier position was within appellant's work restrictions, as identified by Dr. Sidhu. On May 18, 2004 the Office informed appellant that she had failed to provide valid reasons for refusing the offered position and allowed her 15 additional days to accept the position. The Board finds that the Office met its burden of proving that the work offered was suitable and that appellant was informed of the consequences of her refusal to accept the offered employment.[16] When she failed to accept the position within the prescribed 15 days, the Office properly terminated her benefits.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation and schedule award benefits effective August 23, 2004 for refusing a suitable job offer.

[14] *See Franklin D. Haislah,* 52 ECAB 457 (2001).

[15] *Marilyn D. Polk,* 44 ECAB 673 (1993).

[16] *See Maggie L. Moore,* 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

ORDER

IT IS HEREBY ORDERED THAT the August 23, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 2, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member