

dystrophy and left sacroiliac joint dysfunction.¹ Appellant also sustained consequential injuries, which included left heel spur, right knee sprain and a right knee torn meniscus. The Office authorized three arthroscopic procedures for appellant's left knee and a February 14, 2001 right total knee replacement arthroplasty.² Appellant received appropriate wage-loss compensation for total disability. On November 1, 2001 appellant suffered a nonemployment-related heart attack.³

On September 30, 2003 the employing establishment wrote to appellant's internist and orthopedic surgeon inquiring whether she was able to perform her duties as a distribution clerk or alternative light-duty work. The correspondence identified several light-duty assignments available and included a brief description of each position.

Dr. Krishnas R. Singh, a Board-certified internist, responded on October 10, 2003. She noted objective findings of neuropathy, hypertension, coronary artery disease, chronic asthma, left leg osteoarthritis and reflex sympathetic dystrophy. Dr. Singh explained that appellant was restricted to light activity secondary to her asthma and coronary artery disease. She indicated that appellant could not work eight hours per day, but could work a maximum of two hours. Dr. Krishna also noted that appellant could sit 2 hours, stand 30 minutes, walk 15 minutes and could lift up to 10 pounds. Appellant could not perform any bending, squatting, kneeling, twisting or climbing. Additionally, she could perform normal hand functions three to four hours per day, but no fine manipulation, reaching or working above shoulder. Appellant also could not use her feet to operate foot controls and she was limited to operating a car or truck for one hour at a time. Lastly, Dr. Singh indicated that appellant could perform repetitive activities for 30 minutes.

On January 30, 2004 Dr. Robert E. Holladay, a Board-certified orthopedic surgeon, responded to the employing establishment's September 30, 2003 inquiry regarding appellant's ability to work. He advised that she could work eight hours per day, with limitations of eight hours sitting, two hours standing and two hours walking. Dr. Holladay precluded bending, squatting, kneeling, twisting or climbing and he limited appellant's lifting to 10 pounds. Dr. Holladay did not impose any restrictions with respect to normal hand functions, fine manipulations, reaching and working above shoulder. However, he did preclude the use of appellant's feet to operate foot controls and operating a car or truck. Dr. Holladay also indicated that appellant could perform repetitive activities up to four hours. Additionally, he noted that appellant had restrictions from other medical conditions including angina and heart disease, but Dr. Holladay deferred to appellant's internist for specific limitations.

¹ Appellant was also diagnosed with carpal tunnel syndrome, depression and hypertension, which the Office determined were unrelated to the November 2, 1986 employment injury.

² On April 1, 2002 appellant received a schedule award for 50 percent impairment of the right lower extremity. The award covered a period of 130 weeks from March 24, 2002 to December 25, 2004. Appellant previously received two schedule awards for her left lower extremity totaling 38 percent.

³ Dr. Krishna R. Singh, a Board-certified internist, treated appellant for her cardiac condition as well as a number of other nonorthopedic conditions including asthma and diverticulitis.

On April 27, 2004 the employing establishment offered appellant a part-time, limited-duty assignment as a modified mail processing clerk. She was to work two hours a day casing mail. The physical requirements were sitting with rest bar and lifting within medical restriction of no more than 10 pounds. The position description specifically listed the other physical restrictions as listed by Dr. Singh. Appellant accepted the offer on May 17, 2004.⁴ The employing establishment advised the Office of appellant's acceptance on May 24, 2004.

The April 27, 2004 job offer did not identify an effective date or otherwise indicate when appellant was expected to report for duty. The offer noted only that the position was effective "upon completion of reemployment processing." On July 22, 2004 the Office informed the employing establishment that the April 27, 2004 job offer was not valid without an actual effective date. The Office advised the employing establishment to specify the return to work date and obtain appellant's signature noting either her acceptance or rejection of the offer.

On October 5, 2004 the employing establishment extended appellant another offer of employment as a modified mail processing clerk. This latest offer, however, differed from the prior made on April 24, 2004. The position was no longer two hours per day, but instead full-time work. Appellant had a number of different duties including checking identification badges at the employee entrance, sorting and sweeping mail and performing quality checks in automation and manual operations. The job offer also differed from the prior offer in that it was no longer based on Dr. Singh's October 10, 2003 restrictions. The October 5, 2004 job offer referenced only Dr. Holladay's January 30, 2004 physical limitations.

By letter dated October 6, 2004, the Office informed appellant that it found the offered position medically suitable for her work capabilities and that it was currently available. The Office explained that the position was in accordance with Dr. Holladay's January 30, 2004 work restrictions. The Office allowed appellant 30 days to either accept the position or provide an explanation for refusing the position. It advised appellant of the consequences under 5 U.S.C. § 8106(c)(2) of refusing an offer of suitable work.

Appellant's son contacted the Office by telephone on October 12, 2004. He explained that his mother was confused about the change from two hours of work a day to an eight-hour workday. He also explained that her medications precluded her from driving an automobile and expressed reservations about the 7:00 p.m. until 3:30 a.m. shift assignment.

On October 19, 2004 the Office issued a second 30-day letter advising appellant that the modified mail processing clerk position was suitable. The Office explained that the position was consistent with Dr. Holladay's restrictions. Additionally, the Office noted that Dr. Holladay was recognized as appellant's treating physician for her November 2, 1986 employment injury and Dr. Singh, a "pain management specialist," could not address disability issues in the case. Appellant was afforded another 30 days to either accept the position or arrange for a report date.

As of November 12, 2004 appellant had not accepted the October 5, 2004 job offer. That same day the Office wrote to her explaining that the second suitability letter of October 19, 2004

⁴ Appellant noted on the acceptance form that she could not set on the rest bar because her feet had to be flat, not slanted.

was issued in error as she had already received more than 30 days to respond to the October 5, 2004 job offer. The Office further indicated that appellant had not provided a valid reason for not accepting the offered position. The Office reminded appellant of the consequences of refusing an offer of suitable work and afforded her an additional 15 days to accept the position. The Office also indicated that it would not consider any further reasons for refusing the position.

The Office subsequently received two additional reports from Dr. Holladay. In a November 1, 2004 report, Dr. Holladay stated that he advised appellant that from an orthopedic standpoint she could do some light modified work activities. He noted that appellant believed that her psychiatric condition would limit her ability to return to even light modified work activities. On November 4, 2004 Dr. Holladay reiterated that his assessment was strictly based on appellant's abilities from an orthopedic standpoint. He further noted that appellant was currently receiving psychiatric treatment and he provided the name and address of her attending psychiatrist.

By decision dated December 7, 2004, the Office terminated appellant's compensation for failing to accept an offer of suitable work.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.⁵ Under section 8106(c)(2) of the Federal Employees' Compensation Act the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.⁶ To justify termination of compensation, the Office must show that the work offered was suitable,⁷ and must inform appellant of the consequences of refusal to accept such employment.⁸ An employee who refuses or neglects to work after suitable work has been offered or secured for her has the burden of showing that such refusal or failure to work was reasonable or justified.⁹ Additionally, the employee shall be provided the opportunity to make such a showing before entitlement to compensation is terminated.¹⁰

ANALYSIS

The Board finds that the Office failed to demonstrate that the October 5, 2004 job offer was suitable.¹¹ Whether an employee has the physical ability to perform a modified position

⁵ *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

⁶ 5 U.S.C. § 8106(c)(2); 20 C.F.R. § 10.517(a) (1999).

⁷ *Arthur C. Reck*, 47 ECAB 339 (1996).

⁸ *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1972).

⁹ 20 C.F.R. § 10.517(a) (1999).

¹⁰ 20 C.F.R. §§ 10.516, 10.517(b) (1999); *John E. Lemker*, 45 ECAB 258, 263 (1993).

¹¹ *Arthur C. Reck*, *supra* note 7.

offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence.¹² Additionally, it is well established that the Office must consider preexisting and subsequently acquired medical conditions in determining the suitability of an offered position.¹³

While the October 5, 2004 job offer clearly reflects the physical restrictions by Dr. Holladay on January 30, 2004, the Office is not at liberty to disregard Dr. Singh's opinion merely because he is not the recognized treating physician for appellant's accepted conditions. He is a Board-certified internist who has treated appellant for a number of conditions including hypertension, asthma and coronary artery disease. Dr. Singh specifically noted in his October 10, 2003 report that appellant was restricted to light activity due to asthma and coronary artery disease. He also reported that appellant's depression would impair her ability to work. Dr. Singh was of the opinion that appellant could work a maximum of only two hours a day. While there may be some overlap with Dr. Holladay's assessment of appellant's lower extremity limitations, Dr. Singh reported additional upper extremity and cardiopulmonary restrictions that extend beyond the limitations listed by Dr. Holladay. As the Office is obligated to take into account preexisting and subsequently acquired conditions in determining work suitability, its failure to do so in the instant case constitutes reversible error. Accordingly, the Office failed to meet its burden of proof in terminating appellant's compensation.

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation.

¹² See *Gayle Harris*, 52 ECAB 319, 321 (2001); *Maurissa Mack*, 50 ECAB 498 (1999).

¹³ See *Gayle Harris*, *supra* note 12; *Martha A. McConnell*, 50 ECAB 129 (1998).

ORDER

IT IS HEREBY ORDERED THAT the December 7, 2004 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 4, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board