United States Department of Labor
Employees' Compensation Appeals Board

EILEEN CHILEK, Appellant	)	
and	)	**Docket No. 05-1077**
	)	**Issued: November 14, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Windsor, CT, Employer	)	

Appearances:
Katherine Smith, Esq., for the appellant
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 April 8, 2005 appellant filed a timely appeal from an April 9, 2004 decision of the Office of Workers' Compensation Programs terminating her 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(d), the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On March 13, 2000 appellant, then a 45-year-old labor relations specialist, filed an occupational disease claim alleging that she developed tendinitis of both hands as a result of repetitive keyboarding while at work. The Office accepted the claim for bilateral lateral

epicondylitis. Appellant did not stop work until sustaining a recurrence of disability on May 31, 2002. She retired on February 22, 2003.[1]

Appellant sought treatment from Dr. Charlene C. Li, a Board-certified family practitioner, who noted on March 20, 2000 that appellant had undergone carpal tunnel releases and now had pain from her hands to elbow. She diagnosed tendinitis and epicondylitis and opined that her keyboard duties contributed to her condition. Appellant was also treated by Dr. John J. Mara, a Board-certified orthopedist, who noted in reports dated July 1, 1999 to May 25, 2000 that appellant underwent bilateral carpal tunnel releases on December 5, 1998 and January 20, 1999. He noted that she could continue regular duty.

On July 12, 2001 appellant filed a recurrence of disability claim commencing May 30, 2001. She stopped work on June 5, 2001. On October 18, 2001 the Office accepted appellant's claim for recurrence.

Appellant came under the treatment of Dr. Dennis L. Rosati, Board-certified in physical medicine and rehabilitation, who in reports dated January 31 to July 13, 2002, diagnosed recurrent bilateral carpal tunnel syndrome and bilateral medial and lateral epicondylitis. He advised that she had not worked since May 30, 2001 and recommended she not return to work at this time. On April 2, 2002 Dr. Rosati advised that appellant could return to work performing duties including utilizing a telephone and a switchboard with a head set, intermittent keyboarding and driving short distances. He recommended that she return to work on a graduated schedule for four hours per day for the first week, six hours per day for the second week and full time thereafter. In an April 10, 2002 report, Dr. Rosati diagnosed prior bilateral carpal tunnel syndrome and bilateral medial and lateral epicondylitis and noted with a check mark "yes" that appellant's condition was caused or aggravated by her employment activities. He noted that she was totally disabled from June 4, 2001 to the present. In a report dated May 1, 2002, Dr. Rosati clarified his previous work restrictions, noting that appellant could use the keyboard for no more than 15 minutes consecutively and for no more than 1 hour in a 4-hour period. He was provided with a duty status report describing the duties and physical requirements for a labor relations specialist, specifically noting that the position included lifting .1 pound intermittently (equivalent to a file folder), sitting for 4 hours per day, standing, walking, bending/stooping, twisting, simple grasping, pulling/pushing intermittently 5 to 10 minutes per day, fine manipulation intermittent but not more than 2 hours per day with no driving daily but 30 minutes to 3 hours, 1 to 2 days per week. On May 9, 2002 Dr. Rosati approved the duties as set forth on the duty status report and noted that appellant could return to work on April 2, 2002.

On April 9, 2002 appellant advised that she rented space at a co-op antique store and was required to be at the store for which she received no income although she did receive proceeds from any of her items that were sold. She advised that in 2001 she made a net profit of $894.44 and from January to March 2002 her net profit was $205.00. Appellant noted that prior to her May 30, 2001 recurrence she worked three and a half hours every two weeks. She advised that

[1] The record reflects that appellant has filed two other claims which were accepted by the Office, file numbers 01-0359536 for bilateral carpal tunnel syndrome and 01-0373548 for tennis elbows. These claims were consolidated with the current file before the Board.

after her recurrence she did not work at the store for several months; however, from September to December 2001, she worked three and a half hours every two weeks. These hours became intolerable and in January 2002 appellant began working one hour and forty-five minutes every week. Her duties included preparing manual sales slip, logging the item into a sales log and placing items into a bag. Appellant indicated that she did not assist in lifting heavy items.

On June 3, 2002 the employing establishment offered appellant a full-time limited-duty position as a labor relations specialist effective June 17, 2002 with a tour of duty from 8:00 a.m. to 4:30 p.m. and an annual salary of $72,003.00. The offer noted that she would work four hours per day the first week, six hours per day the second week and thereafter eight hours per day in conformance with Dr. Rosati's restrictions. The duties included reading correspondence, meeting with union representatives, dictating, reviewing cases pending arbitration, resolving and closing cases, reading and reviewing recent arbitration decisions, responding to email, providing advice to labor relations specialists by telephone, facscimile or in person. The offer noted that appellant would be provided with a voice-activated typing system for an alternative to using a keyboard. The physical requirements of the position included, lifting .1 pound intermittently (equivalent to a file folder), sitting for 4 hours per day, standing, walking bending/stooping, twisting, simple grasping pulling/pushing intermittently 5 to 10 minutes per day, fine manipulation intermittent but not more than 2 hours per day with no driving daily but ½ to 3 hours, 1 to 2 days per week.

In a June 10, 2002 letter, the Office advised appellant that the job offer constituted suitable work. She was informed that she had 30 days to accept the position or provide reasons for refusing it; otherwise, she risked termination of her compensation benefits.

Appellant submitted a report from Dr. Rosati dated June 7, 2002, who advised that she received a job offer but believed that she could not return due to the possible pain and emotional distress. He noted that she reported continued pain which was aggravated by daily activities but was manageable. Dr. Rosati noted that he supported appellant's decision and opined that the probable increase in symptoms that would occur with a return to work, as well as the potential emotional upset and anxiety disorder, were reasons why appellant could not accept the position. He further noted that etiology of a probable anxiety disorder was attributable to both internal and external stress which would occur if appellant returned to work. Dr. Rosati advised that she was capable of working and recommended maintaining her current restrictions and having her work sedentary light-duty part time four hours per week in activities she enjoyed. He noted no change in her upper extremity appearance or function and advised that appellant had good coordination.

On July 24, 2002 the Office advised appellant that the position of a labor relations specialist was suitable work. The Office noted that it considered the reasons given by her for refusing the position and found them to be unacceptable. The Office afforded appellant 15 additional days to accept the job offer.

In an August 2, 2002 letter, appellant informed the Office that she was diagnosed with depression and anxiety and needed additional time to submit a medical report. In an August 12, 2002 letter, she requested her claim be expanded to include consequential depression and anxiety. Appellant advised that this condition must be considered in determining job suitability.

She submitted a report from Jean B. Brigham, a counselor dated August 9, 2002, who noted counseling appellant since July 31, 2001 for moderate to severe depression/anxiety due to pain from carpal tunnel syndrome and tennis elbow, limited functioning and anxiety. She opined that appellant was unable to work due to the emotional condition that was aggravated by anxiety over her ability to adequately perform the job.

In a decision dated September 26, 2002, the Office terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work.

By a letter dated October 4, 2002, appellant requested an oral hearing before an Office hearing representative. The hearing was held on April 3, 2003.

On October 17, 2002 appellant submitted a September 26, 2002 report from Dr. Rosati, who noted that she presented with pain of the upper extremities and depression. His diagnoses included anxious depression. Dr. Rosati did not note specific work restrictions, but noted that appellant discontinued her prior antique work due to increased pain.

On December 2, 2002 appellant filed a claim for recurrence of disability alleging that she developed an emotional condition causally related to her accepted work-related conditions.

By letter dated May 1, 2003, the Office requested that appellant submit additional information including a detailed description of the employment factors or incidents which she believed had contributed to her claimed recurrence of disability.

Appellant responded to the Office's May 1, 2003 letter on May 29, 2003 and advised that she sought treatment for depression in July 2001 and noted that after the job offer her depression increased. She submitted a September 26, 2002 report from Dr. Rosati, who noted that appellant had upper extremity pain and depression. He diagnosed bilateral lateral epicondylitis, carpal tunnel syndrome and anxious depression. On December 9, 2002 Dr. Rosati submitted a letter in support of her request for disability retirement summarizing a history of her carpal tunnel syndrome and epicondylitis treatment. In a report dated November 14, 2002, Dr. Li noted that she had been treating appellant since 1993 and diagnosed upper extremity pain secondary to carpal tunnel syndrome, reflex sympathetic dystrophy, tendinitis, depression and anxiety. She advised that appellant was disabled. Dr. Li declined to comment on her psychological status and deferred to appellant's psychiatrist and therapist. Also submitted were reports from a counselor, Ms. Brigham, who noted counseling appellant for depression. In a report dated May 28, 2003, Dr. Angela Cappiello, a Board-certified psychiatrist and neurologist, diagnosed major depression, recurrent and moderate. She advised that appellant's chronic and severe pain from her conditions of bilateral carpal tunnel syndrome and bilateral tennis elbow caused a significant adjustment in her life and limitations on her level of functioning which exacerbated her anxiety and depression. Appellant submitted various statements from coworkers describing the actual physical requirements of the proposed limited-duty position.

In a decision dated August 15, 2003, the hearing representative affirmed the Office decision dated September 26, 2002.

In a decision dated November 13, 2003, the Office expanded the acceptance of appellant's claim to include depression and recurrent depressive disorder.

In a January 8, 2004 letter, appellant requested reconsideration. She indicated that her depression and recurrent depressive disorder should have been considered by the Office before terminating her compensation. Appellant further indicated that the hearing representative failed to consider testimony of coworkers regarding the proposed position. Additionally, she noted that the Office did not consider the reports of Ms. Brigham dated November 14, 2002 and Dr. Li dated November 14, 2002, concerning her ability to accept the offered position. Appellant submitted a report from Dr. Cappiello dated March 24, 2003, who noted that she had been under her care since October 30, 2002. She reported over a year history of progressive depressive symptoms with frustration and anxiety and believed the symptoms were precipitated by her work injuries. Also submitted was an April 25, 2003 statement from Sylvia Woodside, who worked at the employing establishment and described the duties of the proposed labor relations representative position.

In a decision dated April 9, 2004, the Office denied modification of the prior decision.

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for him is not entitled to compensation.[2] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. 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.[3] 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 or neglected by appellant was suitable.[4]

The implementing regulation provides that an employee, who refuses or neglects to work after suitable work has been offered or secured 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 a showing before entitlement to compensation is terminated.[5] To

[2] 5 U.S.C. § 8106(c)(2).

[3] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

[4] *Glen L. Sinclair*, 36 ECAB 664 (1985).

[5] 20 C.F.R. § 10.517(a) (1999); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(5) (July 1997).

justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[6]

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.[7] In assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[8] Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer, medical evidence of inability to do the work or travel to the job or the claimant found other work which fairly and reasonably represents his or her earning capacity (in which case compensation would be adjusted or terminated based on actual earnings). Furthermore, if medical reports document a condition which has arisen since the compensable injury and the condition disables the employee, the job will be considered unsuitable.[9] Lastly, if the employee is required to move to a certain area, isolated or otherwise, because of health conditions which were caused by the injury or which predated it, the issue of availability must be considered with respect to the new area of residence.[10]

ANALYSIS

The Office accepted that appellant sustained a bilateral lateral epicondylitis. The Office terminated her compensation effective September 26, 2002 based on appellant's refusal of suitable work. The Board finds that the Office established that the offered position of June 3, 2002 was suitable.

The Office established that the offered position of June 3, 2002, was suitable. Dr. Rosati's reports dated April 2 and May 1, 2002 advised that appellant could return to work in a position consisting primarily of utilizing a telephone, a switchboard with a head set and intermittent use of a keyboard for no more than 15 minutes consecutively and for no more than 1 hour in a 4-hour period, with the ability to drive short distances. He recommended that she return to work on a graduated schedule for four hours per day for the first week, six hours per day for the second week and full time thereafter. Dr. Rosati was provided with a duty status report describing the duties and physical requirements for the offered position of a labor relations specialist, specifically noting that the position included lifting .1 pound intermittently (equivalent

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

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

[8] *See Connie Johns*, 44 ECAB 560 (1993).

[9] *Id*. at Chapter 2.814.4(b)(4) (July 1997).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b) (July 1997); *see Edward J. Stabell*, 49 ECAB 566 (1998).

to a file folder), sitting for 4 hours per day, standing, walking, bending/stooping, twisting, simple grasping, pulling/pushing intermittently 5 to 10 minutes per day, fine manipulation intermittent but not more than 2 hours per day with no driving daily but 30 minutes to 3 hours, 1 to 2 days per week. On May 9, 2002 Dr. Rosati approved of the duties as set forth in the duty status report and noted that appellant could return to work in the position on April 2, 2002. The Board notes that Dr. Rosati, as appellant's treating physician, had complete knowledge of the relevant facts and had numerous opportunities to examine her and to evaluate the course of her condition. Dr. Li clearly opined that she could return to work subject to the restrictions set forth in the duty status report of May 9, 2002. His opinion, therefore, must be considered reliable. The Board finds that Dr. Rosati's opinion with respect to appellant's work limitations is based on a proper factual background and is sufficient to establish that the position is medically suitable to her work restrictions.[11]

To properly terminate compensation under section 8106, the Office must provide appellant notice of its finding that an offered position is suitable and give her an opportunity to accept or provide reasons for declining the position.[12] The Office properly followed its procedural requirements in this case. By letter dated June 10, 2002, the Office advised appellant that a partially disabled employee who refused suitable work was not entitled to compensation, that the offered position had been found suitable and allotted her 30 days to either accept or provide reasons for refusing the position.[13] She responded by submitting a report from Dr. Rosati dated June 7, 2002, who noted that he supported appellant's decision not to accept the job offer and opined that the "probable increase in symptoms that would occur with return to work" as well as emotional upset and anxiety disorder which would occur were the reasons appellant could not accept the position. Dr. Rosati further noted that etiology of the "probable anxiety disorder" is attributable to both internal and external stress that would occur if appellant returned to work. His restrictions on her return to work were prophylactic in nature and that fear of future injury is not compensable under the Act.[14] This evidence was insufficient to show that the offered position was not medically suitable. Dr. Rosati's treatment note merely noted appellant's symptoms, but did not address the suitability of the offered position. His opinion, however, while generally supporting continuing symptoms of bilateral carpal tunnel syndrome and epicondylitis, does not explain how her condition and residuals prevented her return to work in the modified position on June 3, 2002 when the Office notified her of the offered position and its finding that it was suitable, nor did Dr. Rosati retract his prior reports which noted that appellant could return to a limited-duty position subject to the restrictions noted above. The report of Dr. Rosati is not sufficient to establish that she could not perform the offered position at the time the job was offered or at any time prior to the termination of benefits.[15] The medical

[11] *See generally Melvina Jackson*, 38 ECAB 443, 450 (1987) (discussing the factors that bear on the probative value of medical opinions).

[12] *See Maggie L. Moore, supra* note 6.

[13] *See Bruce Sanborn*, 49 ECAB 176 (1997).

[14] *See Mary Geary,* 43 ECAB 300, 309 (1991); *Pat Lazzara,* 31 ECAB 1169, 1174 (1980) (finding that appellant's fear of a recurrence of disability upon return to work is not a basis for compensation).

[15] *See Gayle Harris*, 52 ECAB 319 (2001).

evidence of record thus, establishes that, at the time the job offer was made, appellant was capable of performing the modified position.

Thereafter, on July 24, 2002 the Office advised appellant that the reasons given for not accepting the job offer were unacceptable. The Office advised that she had 15 additional days from July 24, 2002 to accept the offer and if she did not a final decision under 5 U.S.C. § 8106(c)(2) would be made. In letters dated August 2 and 12, 2002, appellant noted that she was diagnosed with depression and anxiety and requested that her claim be expanded to include consequential depression and anxiety. She also submitted a report from Ms. Brigham, a counselor dated August 9, 2002, who noted counseling appellant since July 31, 2001 for moderate to severe depression/anxiety. However, the Board notes that such reports are not considered medical evidence as a counselor is not considered a physician under the Act.[16] Therefore, appellant did not submit any medical evidence to show that the offered position was not medically suitable.[17] Thus, under section 8106 of the Act, her compensation was properly terminated.

The Board notes that a reason which may be considered acceptable for refusing such an offered job includes the situation when "the claimant found other work which fairly and reasonably represents his or her earning capacity (in which case compensation would be adjusted or terminated based on actual earnings)."[18] In the present case, the evidence does not support that appellant's work at an antique store reasonably represented her wage-earning capacity. She advised that she rented space at a co-op antique store and specifically stated that she received no salary from the time she worked at the antique store but only income from items sold. Appellant advised that in 2001 she made a net profit of $894.44 and from January to March 2002 her net profit was $205.00. She noted that, prior to May 30, 2001, she worked three and a half hours every two weeks; however, after this date she stopped work completely and in September 2001 began to work intermittently for 1 hour and 45 minutes every week. However, the medical evidence suggests that as of April 2002 she was capable of performing a variety of managerial work, including using a telephone switchboard and intermittent keyboarding and could work on a graduated schedule of four hours per day the first week, six hours per day the second week and eight hours per day thereafter. The Board finds that appellant was capable of performing a position for at least 4 hours per day graduating to 8 hours per day and, therefore, the position in the antique shop for 1 hour and 45 minutes per week did not fairly and reasonably represent her wage-earning capacity.

[16] *See* 5 U.S.C. § 8101(2) (this subsection defines a ''physician'' as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law); *see also Charley V.B. Harley,* 2 ECAB 208, 211 (1949) (where the Board has held that a medical opinion, in general, can only be given by a qualified physician).

[17] *See Les Rich,* 54 ECAB ___ (Docket No. 01-1995, issued January 2, 2003).

[18] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.5a(2) (July 1997).

As the Office met its burden of proof to terminate appellant's compensation based on her refusal of suitable work, the burden then shifted to appellant to show that her refusal to work in that position was justified.[19]

Following the Office's September 26, 2002 decision, appellant testified at the hearing and argued that her emotional condition was accepted by the Office after the termination of benefits and the acceptance of this condition affected the suitability of the offered position. However, the Board finds this argument without merit, as the evidence shows that as the Office terminated wage-loss compensation, there was no reasoned medical evidence supporting that any emotional condition rendered her disabled from the offered position. Although Dr. Rosati opined in a report dated June 7, 2002 that he supported appellant's decision not to accept the job offer due to probable emotional upset and anxiety, as noted above, these restrictions are prophylactic in nature and that fear of future injury is not compensable under the Act.[20] This evidence was insufficient to show that the offered position was not medically suitable and is, therefore, insufficient to meet appellant's burden of proof.

After wage-loss benefits were terminated appellant submitted a report from Dr. Rosati dated September 26, 2002, who noted her diagnoses and noted that she would have difficulty performing light work due to increased pain. On December 9, 2002 he submitted a letter in support of her request for disability retirement summarizing a history of appellant's carpal tunnel syndrome and epicondylitis treatment. However, these reports are insufficient to establish that the position offered appellant was unsuitable as Dr. Rosati did not provide a reasoned opinion explaining how or why appellant's diagnosed conditions prevented her from performing the job duties of the selected position at the time her compensation was terminated. Likewise, as noted above, to the extent that he changed his opinion on appellant's ability to engage in duties consistent with the offered position, Dr. Rosati did not provide a reasoned opinion to explain why he revised his opinion on her work status.

Also submitted was a report dated November 14, 2002 from Dr. Li, who diagnosed upper extremity pain secondary to carpal tunnel syndrome, reflex sympathetic dystrophy, tendinitis, depression and anxiety. She advised that appellant's conditions had caused disability and psychological and emotional distress. However, these reports are insufficient to establish that the position offered her was unsuitable as Dr. Li did not explain how any specific diagnosed conditions prevented her from performing the job duties of the modified position on or after June 3, 2002 when the Office notified her of the offered position. This evidence is insufficient to meet appellant's burden of proof. Further reports from Ms. Brigham, as noted above, are also insufficient since such reports are not considered medical evidence as a counselor is not considered a physician under the Act.[21]

Other reports from Dr. Cappiello dated March 24 and May 28, 2003 diagnosed major depression, recurrent and moderate and advised that appellant's chronic and severe pain from her

[19] *See Ronald M. Jones*, 52 ECAB 190 (2000).

[20] *See Mary Geary*, *supra* note 14.

[21] *Supra* note 16.

conditions of bilateral carpal tunnel syndrome and bilateral tennis elbow caused a significant adjustment in her life that exacerbated her anxiety and depression. However, these reports are insufficient to establish that the position offered appellant was unsuitable as he offered no diagnosis or explanation of how or why her conditions prevented her from performing the job duties of the selected position at the time prior to the time her benefits were terminated.

Appellant submitted various statements from coworkers describing the actual physical requirements of the limited-duty position she refused. However, suitability of a position, as noted above, is primarily a medical question. These statements are also insufficient to establish that the actual duties of the offered position differed significantly from the duties set forth in the employing establishment's June 3, 2002 job offer.

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's disability compensation under 5 U.S.C. § 8106(c)(2) for refusal of suitable employment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 9, 2004 is affirmed.

Issued: November 14, 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