United States Department of Labor
Employees' Compensation Appeals Board

SHEILA L. BROCK, Appellant	)	
and	)	**Docket No. 05-1213**
	)	**Issued: November 21, 2005**
U.S. POSTAL SERVICE, POST OFFICE, CLEVELAND, TN, Employer	)	

Appearances:
Sheila L. Brock, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 10, 2005 appellant filed timely appeal of the Office of Workers' Compensation Programs' decisions dated February 11, 2005, which denied modification of a July 27, 2004 decision, which affirmed the termination of her compensation benefits for refusing an offer of suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly terminated appellant's wage-loss compensation under 5 U.S.C. § 8106(c) on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On May 24, 2000 appellant, a 37-year-old mail carrier, filed a traumatic injury claim alleging that she injured her right shoulder and neck on May 23, 2000 when her mail jeep hit the side of a telephone pole and embankment after the tie rod broke. The Office accepted her claim for neck and right shoulder strains and herniated cervical nucleus pulposus. Appellant returned

to limited duty on May 24, 2000, stopped work on December 10, 2001 and was placed on the periodic rolls for temporary total disability on May 19, 2002. On December 16, 2004 the Office accepted displacement of a cervical interverbral disc without myelopathy and degeneration of intervertebral disc.

In a report dated August 8, 2002, Dr. Gregory P. White, a Board-certified physiatrist and attending physician, outlined work restrictions. He opined that appellant could initially work a three-hour day three times per week for two weeks and then a four-hour workday for three days per week for two weeks. The restrictions included no lifting over 10 pounds and avoiding overhead lifting or reaching.

Dr. White, in a November 27, 2002 report, opined that appellant could work four-hours a day with restrictions. The restrictions included no lifting over 10 pounds and avoiding overhead lifting or reaching.

On January 31, 2003 the Office received a response from Dr. Richard G. Pearce, a treating Board-certified orthopedic surgeon, regarding the restrictions of Dr. White. Dr. Pearce checked "yes" to indicate his agreement with the restrictions prescribed by Dr. White.

On February 3, 2003 the Office offered appellant limited duty as a rural carrier associate with no lifting over 10 pounds and avoiding overhead lifting or reaching. The offered duties were general light filing, checking carriers in, vehicle reports, filling out second notice cards, locking up the lobby, answering telephones and assisting with customer issues and other duties within her restrictions. The hours of duty were 2:00 p.m. to 6:00 p.m. and she worked Monday through Saturday.

On February 12, 2003 appellant refused the position on the grounds that it was not within her work restrictions. She stated that her physician restricted work to three hours per day three days a week and that she was not capable of working six days a week.

On February 24, 2003 the Office advised appellant that it had found the job offer suitable and, pursuant to 5 U.S.C. § 8106(c)(2), a partially disabled employee who refused an offer of suitable work was not entitled to compensation. She was provided 30 days to accept the offer or provide reasons for refusing it.

On February 26, 2003 the Office received a second opinion evaluation dated February 10, 2003 by Dr. John W. Lamb a Board-certified orthopedic surgeon. He opined that appellant was capable of working with restrictions. In an attached work-capacity evaluation (Form OWCP-5c), Dr. Lamb indicated that appellant was capable of working four hours per day with restrictions including no repetitive lifting more than 10 pounds as well as limitations on bending, standing, walking, twisting, reaching above the shoulder, bending/stooping and a 10-minute break every 2 hours.

On March 28, 2003 the Office received a letter dated January 28, 2003, from appellant's attorney contending that appellant was incapable of light-duty work until after a required surgical procedure, recommended by Drs. Pearce and White, was done.

In a May 9, 2003 letter, the Office requested clarification from Dr. Pearce regarding the necessity for surgery and appellant's ability to work. On June 27, 2003 the Office received Dr. Pearce's response. Dr. Pearce indicated that he was not requesting surgery at this time and that he had referred appellant to see Dr. Roger W. Catlin, a Board-certified anesthiologist with a sub-specialty in pain management. He stated that he had reviewed the February 3, 2003 job offer and found that it was within appellant's restrictions.

On July 2, 2003 the Office advised appellant that she had 15 days to accept the offer with no penalty. The Office noted that Dr. Pearce had reviewed the job offer and indicated it was within appellant's work restrictions. On March 14, 2003 the Office received a response from appellant dated February 21, 2003, contending that she could not perform the offered position, since twisting, turning or bending at the waist caused irritation and swelling.

By decision dated July 22, 2003, the Office terminated appellant's wage-loss compensation and schedule award benefits effective July 23, 2003, finding that she refused an offer of suitable work.

In a letter dated July 22, 2003 and received on July 25, 2003, appellant's counsel stated that appellant had not refused an offer of suitable work. He submitted an undated statement by Dr. Pearce, who checked "yes" to the question that appellant was unable to perform limited-duty work due to her employment injury. He also stated that it was unknown whether appellant required surgery to treat her employment-related condition and whether appellant was unable to return to work until after the procedure.

On August 4, 2003 the Office received the response of Dr. Dennis C. Ford, a treating Board-certified anesthesiologist and family practitioner, to questions posed by appellant's attorney. Dr. Ford checked "no" in response to the question of whether appellant was unable to perform the limited-duty job offer due to her employment injury. He noted that appellant stated: "she can[no]t flex or bend cervical spine to be able to write or read the letters without significant pain."

On August 6, 2003 appellant's counsel requested an oral hearing which was held on May 4, 2004.

By decision dated July 27, 2004, an Office hearing representative affirmed the July 22, 2003 decision, finding that it had complied with its procedural requirements by advising appellant that the position offered by the employing establishment was found suitable and providing her with the opportunity to accept the position or provide reasons for refusing. It was found that the job offer was suitable and met the restriction requirements recommended by appellant's treating physicians.

Appellant, through counsel, requested reconsideration in a letter dated November 2, 2004. She submitted reports dated June 5, 2001 and April 22, 2003 and an undated response to interrogatories by Dr. Pearce, a report dated June 29, 2004 and undated interrogatories by Dr. Ford, an August 15, 2001 report by Dr. S. Craig Humphreys, a Board-certified orthopedic surgeon and a February 10, 2003 report by Dr. Lamb. The Office also received reports dated August 5 to November 8, 2004 by Robert DeLong, a physician's assistant,

and a December 24, 2004 report by Dr. Ford, who checked "yes" to the question of whether he had reviewed and was familiar with appellant's February 2, 2003 limited-duty job offer. Dr. Ford checked "no" to the question of whether appellant was "currently unable to perform" the offered limited-duty job due to her accepted employment injury. He noted that appellant informed the physician that she was unable to bend or flex her cervical spint such that she was "able to write or read the letters without significant pain." Dr. Pearce checked "yes" that appellant was unable to perform the offered limited-duty position due to her accepted employment injuries. He indicated that it was unknown whether surgery was required to treat appellant's condition or that she was unable to work until she had the surgery and after an appropriate period for recovery.

By decision dated February 11, 2005, the Office denied appellant's request for modification of the decision terminating her benefits on the grounds that she refused an offer of suitable work.[1]

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[2] The Office has authority under section 8106(c)(2) of the Federal Employees' Compensation Act to terminate compensation for any partially disabled employee who refuses or neglects to work after suitable work is offered.[3] To justify termination, the Office must show that the work offered was suitable, that appellant was informed of the consequences of her refusal to accept such employment and that she was allowed a reasonable period to accept or reject the position or submit evidence or reasons why the position is not suitable and cannot be accepted.[4] The Office regulation provides that, in determining what constitutes "suitable work" for a particular disabled employee, the Office considers the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors.[5]

[1] Subsequent to the issuance of the Office decision, appellant submitted additional evidence. As this evidence was not previously submitted to the Office for consideration prior to its decision of Feburary11, 2005, it represents new evidence which cannot be considered by the Board in the current appeal. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c); *see Shirley Rhynes*, 55 ECAB ___ (Docket No. 04-1299, issued September 9, 2004).

[2] *Willa M. Frazier*, 55 ECAB ___ (Docket No. 04-120, issued March 11, 2004); *see also Roberto Rodriguez*, 50 ECAB 124 (1998).

[3] 5 U.S.C. § 8106(c).

[4] *See Ronald M. Jones*, 52 ECAB 190 (2000); *see also Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992). *See also* 20 C.F.R. § 10.516; (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).

[5] *Rebecca L. Eckert*, 54 ECAB ___ (Docket No. 01-2026, issued November 7, 2002).

Once the Office has demonstrated that the job offered is suitable, the burden shifts to the employee to show that his or her refusal to work is reasonable or justified.[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] 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 level of analysis manifested and the medical rationale expressed in support of the physician's opinion.

ANALYSIS

The Office accepted that appellant sustained neck and right shoulder strains and herniated cervical nucleus pulposus as a result of the accident on May 23, 2000. On February 3, 2003 she was offered limited duty as a rural carrier associate with no lifting over 10 pounds, avoiding overhead lifting or reaching and working 4 hours per day and 6 days per week. The Office terminated appellant's compensation by decision dated July 22, 2003 on the grounds that she refused an offer of suitable work. The initial question is whether the Office properly determined that the position was suitable.

The issue of whether an employee has the physical ability to perform the duties of a modified position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence.[8] In this case, the Office relied on the opinion of Drs. Pearce and White in finding that the limited-duty rural carrier associate position offered by the employing establishment was within appellant's work limitations. The restrictions listed by Dr. White included no lifting over 10 pounds and avoiding any overhead lifting or reaching and working a 4-hour day. The record shows that the physical capacity required for the position was within appellant's work restrictions as listed by Dr. White and Dr. Pearce agreed with the restrictions set by Dr. White. The Office, therefore, properly found that the offered position was suitable.[9] Upon advising appellant that the offered position was suitable, the Office provided appellant 30 days to accept the position or provide reasons for refusal. Appellant responded that she would not accept the position as it did not comply with restrictions set by her physician and she was not capable of working six days a week. On July 2, 2003 the Office advised appellant that her reasons for refusing the position were not acceptable and she had 15 days to accept the position. Appellant did not respond and the Office terminated her wage-loss compensation and schedule award benefits by decision dated July 22, 2003. The reports of Drs. White and Pearce established that appellant could perform the duties of the offered position as of the Office's July 22, 2003 decision and she has not offered an acceptable reason for refusing the offered

[6] 20 C.F.R. § 10.517. *See Kathy E. Murray*, 55 ECAB ___ (Docket No. 03-1889, issued January 26, 2004); *see also Ronald M. Jones*, *supra* note 4.

[7] *See Kathy E. Murray*, *supra* note 6; *see also Maurissa Mack*, 50 ECAB 498 (1999).

[8] *Maurissa Mack*, *supra* note 7.

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

position. Therefore, the Board finds that the Office met its burden of proof to terminate appellant s compensation based on her refusal to accept an offer of suitable work.

Where the Office shows that an offered limited-duty position was suitable based on a claimant's work restrictions at that time, the burden shifts to the claimant to show that his or her refusal to work in that position was justified.[10] Appellant, in support of her request for an oral hearing submitted an undated statement by Dr. Pearce and an undated statement by Dr. Ford. Dr. Pearce checked "yes" to the question that appellant was unable to perform limited-duty work due to her employment injury. He also stated that it was unknown whether appellant required surgery to treat her employment-related condition and whether appellant was unable to return to work until after the procedure. Dr. Ford checked "no" to the question of whether appellant was unable to perform the limited-duty job offer due to her employment injury. He noted that appellant stated: "she can[no]t flex or bend cervical spine to be able to write or read the letters without significant pain."

Appellant submitted reports dated June 5 and April 22, 2003 and an undated response to interrogatories by Dr. Pearce, a report dated June 29, 2004 and undated interrogatories by Dr. Ford, an August 15, 2001 report by Dr. Humphreys, a Board-certified orthopedic surgeon and a February 10, 2003 report by Dr. Lamb. The interrogatories by Drs. Ford and Pearce are insufficient to establish that appellant was unable to perform the duties of the offered position as these interrogatories fail to provide reasoned medical rationale as to why she was unable to perform the limited-duty rural carrier position. Additionally, Dr. Ford's interrogatory is contradictory or inconsistent in that he responded "no" to the query of whether appellant was unable to perform limited-duty work resulting from the effects of her employment injury, which indicates that she was capable of performing such. Dr. Ford did not provide a supplemental report to explain away this discrepancy. The report by Dr. Craig predates the termination and thus does note appellant's physical ability at the time of the termination. Dr. Lamb opined that appellant was capable of working four hours per day and that she could perform the duties of the offered position. Appellant also submitted reports by Mr. DeLong, a physician's assistant. As a physician's assistant is not a physician within the meaning of the Act, these reports are of no probative medical value in this case.[11] The Board will affirm the February 11, 2001 Office decision denying modification of the July 27, 2004 hearing representative decision. Appellant has failed to meet her burden of proof to show that her refusal to accept the suitable work was justified.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation effective July 23, 2003 on the grounds that she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

[10] *Deborah Hancock*, 49 ECAB 606 (1998).

[11] *See* 5 U.S.C. § 8101(2); *Ricky S. Storms*, 52 ECAB 349 (2001).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers Compensation Programs dated February 11, 2005 and July 27, 2004 are affirmed.

Issued: November 21, 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