United States Department of Labor
Employees' Compensation Appeals Board

BRENDA C. McQUISTON, Appellant	)	
and	)	**Docket No. 05-1194**
	)	**Issued: April 19, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Tyler, TX, Employer	)	

Appearances:
Brenda C. McQuiston, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 9, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated January 13 and April 7, 2005 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, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office met its burden of proof to terminate appellant's compensation benefits effective January 13, 2005 on the grounds that she refused an offer of suitable employment.

FACTUAL HISTORY

On July 9, 1993 appellant, then a 46-year-old clerk, filed an occupational disease claim alleging that she developed pain in her left shoulder, and numbness and swelling in her left arm and hand due to boxing mail in the performance of duty. The Office accepted appellant's claim

for cervical subluxation. Appellant continued to work in a light-duty status until August 21, 1996, when she stopped working.

This is the second appeal before the Board. By decision dated September 22, 2003, the Board found that the Office failed to meet its burden of proof to terminate appellant's compensation benefits effective June 11, 2002, in that leading questions had been submitted to the second opinion examiner. The findings of fact and conclusions of law are incorporated herein by reference.[1]

On July 8, 2004 the Office referred appellant, together with a statement of accepted facts and the medical record, to Dr. Robert Chouteau, a Board-certified osteopath specializing in orthopedic surgery, for a second opinion examination and a determination of her work capacity. The record contains an electromyography (EMG) and nerve conduction report from Dr. Mike Shah, a Board-certified internist, dated August 17, 2004. The record also contains an August 17, 2004 functional capacity evaluation signed by Tresha L. Hester, M.Ed., OTR, reflecting that appellant was functioning at a sedentary physical demand level.

In a report dated August 17, 2004, Dr. Chouteau opined that appellant was capable of returning to work eight hours per day with restrictions. His examination of appellant's cervical spine revealed flexion of 30 degrees; extension of 35 degrees; lateral flexion to the right of 25 degrees; lateral flexion to the left of 20 degrees; rotation to the right of 40 degrees; and rotation to the left of 35 degrees. Examination of the left upper extremity revealed full radial pulses; positive Tinel's sign at the ulnar nerve at the left elbow; negative Adson's sign; negative Wright's sign; and deep tendon reflexes of the biceps and triceps. Dr. Chouteau stated that the left shoulder showed limitation in range of motion; flexion of 40 degrees; internal rotation of 15 degrees; external rotation of 70 degrees; and no musculature weakness on left deltoid. He reported negative Tinel's and Phalen's signs of the left wrist area. Dr. Chouteau provided diagnoses of cervical thoracic myositis; cervical spondylosis C5-6, C6-7 and C7-T1; and cubital tunnel syndrome, left elbow. After reviewing appellant's x-rays and EMG reports, he reported that there was no subluxation noted on flexion or extension views at C3-4. Dr. Chouteau also stated that there was definite narrowing of the disc space noted at C5-6, C6-7 and C7-T1.

In an accompanying work capacity evaluation, Dr. Chouteau opined that appellant could work eight hours per day with the following restrictions: reaching for no more than four hours; reaching above the shoulder, twisting, bending, stooping and bending repetitively at the wrists and elbows for no more than two hours; operating a motor vehicle to/from work for no more than one hour; operating a motor vehicle at work for no more than one hour; and kneeling, squatting and climbing for no more than four hours. Appellant was restricted from lifting, pulling and pushing more than 5 pounds for more than 4 hours and was advised to take 15-minute breaks every 3 hours.

[1] Docket No. 03-1725 (issued September 22, 2003).

Appellant submitted a December 3, 2003 attending physician's report from Dr. Luther Bratcher, a chiropractor, who stated that she had lost strength in her upper extremities to the point that she could not perform the lightest of duties.[2]

On November 24, 2004 the employing establishment made a limited-duty job offer to appellant as a modified clerk. The position was full time, requiring appellant to intermittently walk, sit, stand, reach above the shoulder and perform simple grasping. The offer indicated that appellant would "perform these functions within her weight restrictions."

On November 29, 2004 the Office informed appellant that it found the position of clerk suitable and in accordance with her medical limitations as provided by Dr. Chouteau in his August 17, 2004 report. The Office confirmed that the position was 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.

By letter dated December 23, 2004, appellant refused the job offer, contending that: Dr. Bratcher is recognized as a licensed physician under the Act; the statement of accepted facts presented to Dr. Chouteau was inaccurate because it failed to state that appellant had been injured in 1988, 1989 and again in 1990, and it incorrectly stated that she had been out of work from June 1993 to June 1994; Dr. Chouteau did not address every report since 1993; there was a conflict in medical opinion, in that the December 23, 2002 magnetic resonance imaging (MRI) scan report showed evidence of subluxation at C3-4, but Dr. Chouteau found no evidence of subluxation; Dr. Chouteau's examination lasted only an hour and a half; and the required driving time to and from the proposed job (one hour each way) was outside of Dr. Chouteau's restriction.

Appellant submitted a letter dated December 21, 2004 from Dr. Bratcher. Relying on his own October 31, 2000 functional capacity examination, Dr. Bratcher opined that appellant could not aerobically or posturally handle a part-time or full-time job. Appellant submitted duplicative medical reports, including: reports from Dr. Talent A. Teoh , a Board-certified physiatrist, dated December 23, 2002 and January 9 and April 23, 2003, reflecting that appellant continued to suffer residuals from the 1992 injury and noting minimal subluxation at C3-4; a March 3, 1992 report from Dr. L.T. Johnson, a treating physician, addressing complaints related to appellant's 1988 injury; a November 21, 2001 report from Dr. Chet J. Nix, D.C., a chiropractor, providing impressions of cervical sprain/strain with radiculopathy and disc bulge at C4-5 and C5-6 with spurs; and an October 31, 2000 functional capacity evaluation from Dr. Bratcher, who opined that appellant could not work based on the tests performed.

The record contains a memorandum to the file dated December 29, 2004 reflecting that the statement of accepted facts provided to Dr. Chouteau incorrectly indicated that appellant had lost time from work following her April 23, 1993 injury from June 1993 through June 1994. The

[2] On October 1, 2001 Dr. Bratcher provided a diagnosis of subluxation as demonstrated by x-ray. Under section 8101(2) of the Federal Employees' Compensation Act, the term physician includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation of the spine as demonstrated by x-ray to exist and subject to regulation by the Secretary. As Dr. Bratcher diagnosed spinal subluxations based on x-rays, he is considered a physician as defined under the Act. 5 U.S.C. § 8101(2); *Carmen Gould*, 50 ECAB 504 (1999).

Office determined that clarification was not necessary because Dr. Chouteau's second opinion was based on the most current medical evidence and his own physical examination.

By letter dated December 29, 2004, the Office advised appellant that it had determined that she failed to provide valid reasons for refusing to accept the offered position. The Office explained that Dr. Bratcher's report lacked probative value because it was based on a four-year-old functional capacity evaluation; other medical reports submitted were repetitive; the minor discrepancies in the statement of accepted facts were not a factor in Dr. Chouteau's determination of her work tolerance in 2004; the most recent x-ray, taken in 2004, carried more weight that a 2002 MRI scan; the length of Dr. Chouteau's examination was not determinative; and the Office is not required to offer a claimant a job in the area of her current residence if she has moved further away from the original commuting area for personal reasons. The Office further advised appellant 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 benefits would be terminated. She did not respond.

By decision dated January 13, 2005, the Office terminated appellant's compensation benefits as of that date, finding that she refused an offer of suitable work.

In a letter dated January 7, 2005, appellant reiterated that the statement of accepted facts provided to Dr. Chouteau was inaccurate and that there was no indication that he had reviewed or approved the job offer regarding the driving restriction. Appellant further alleged that her physician had advised her not to accept the position.

On February 25, 2005 appellant requested reconsideration and submitted numerous notes from Dr. Bratcher from January 31 through March 24, 2005. Appellant also submitted a letter of medical necessity dated March 16, 2005 requesting approval for a portable emergency medical service unit. None of the documents addressed her ability to work.

By decision dated April 7, 2005, the Office denied modification of its January 13, 2005 decision, finding that she had not provided a well-reasoned medical report supporting her inability to perform the job offered by the employing establishment.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[3] In this case, the Office terminated appellant's compensation under section 8106(c)(2) of the Act, which 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.[4] 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] Section 8106(c) will be

[3] *Linda D. Guerrero*, 54 ECAB 556 (2003); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[4] 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

[5] *Ronald M. Jones*, 52 ECAB 190 (2000); *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

narrowly construed as it serves as a penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[6]

Section 10.517(a) of the Act's implementing regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured by the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.[7] Pursuant to section 10.516, the employee shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.[8]

ANALYSIS

The Board finds that the Office properly terminated appellant's compensation benefits effective January 13, 2005 on the grounds that she refused an offer of suitable work.

The weight of the medical evidence is represented in Dr. Chouteau's August 17, 2004 second opinion report, which established that the position was within appellant's physical capabilities. Dr. Chouteau considered the results of an August 17, 2004 nerve conduction study and a functional capacity evaluation, which reflected that appellant was capable of function at a sedentary physical demand level. Following a thorough examination of appellant and review of the entire medical record and statement of accepted facts, Dr. Chouteau, opined that appellant was capable of working a modified position for eight hours with restrictions. Restrictions included reaching for no more than four hours; reaching above the shoulder, twisting, bending, stooping, and bending repetitively at the wrists and elbows for no more than two hours; operating a motor vehicle to/from work for one hour; operating a motor vehicle at work for one hour; and kneeling, squatting and climbing for no more than four hours. Appellant was restricted from lifting, pulling and pushing more than 5 pounds for more than 4 hours and was advised to take 15-minute breaks every 3 hours.

Based on Dr. Chouteau's restrictions, the employing establishment offered appellant a clerk position that required her to intermittently walk, sit, stand, reach above the shoulder and perform simple grasping within her weight restrictions. The Office informed appellant on November 29, 2004 that it found the position suitable and in accordance with her medical restrictions, as provided by Dr. Chouteau. It advised her that she had 30 days to report to duty or provide valid reasons for refusing to do so. The record reflects that the modified-duty clerk position offered to appellant on November 24, 2004 conformed to the work restrictions set by Dr. Chouteau. The clear weight of the medical opinion evidence, as represented by the report of Dr. Chouteau, establishes that appellant was no longer totally disabled for work and that she had the physical capacity to perform the modified duties as listed in the November 24, 2004 job offer for eight hours a day.

[6] *Joan F. Burk*e, 54 ECAB 406 (2003); *see Robert Dickerson*, 46 ECAB 1002 (1995).

[7] 20 C.F.R. § 10.517(a); *see Ronald M. Jones, supra* note 5.

[8] 20 C.F.R. § 10.516.

Appellant rejected the job offer on December 23, 2004, contending that Dr. Chouteau's report should be excluded as inaccurate; there was a conflict in medical opinion because her chiropractor disagreed with Dr. Chouteau as to the existence of a subluxation; the statement of accepted facts incorrectly indicated that she had been out of work from June 1993 through June 1994; and that the examination lasted only about an hour and a half. She also alleged that the required driving time to and from the proposed job (one hour each way) exceeded Dr. Chouteau's restrictions. Appellant submitted several medical reports from 1992 through 2003, which were duplicative of those previously considered and did not address her ability to perform the functions of the offered position. She also submitted a December 21, 2004 letter from Dr. Bratcher, who opined that appellant was "aerobically or posturally" of handling a full-time or part-time job. The Board finds that appellant has submitted insufficient medical evidence providing valid reasons for her refusal of suitable work. Dr. Bratcher's opinion was admittedly based on an October 31, 2000 functional capacity examination. He did not address appellant's current condition or the results of the August 17, 2004 functional capacity evaluation performed at the request of Dr. Chouteau. Therefore, Dr. Bratcher's opinion is of diminished probative value. The Board notes that as Dr. Bratcher diagnosed spinal subluxations based on x-rays, he is considered a physician as defined under the Act.[9] However, the Board accords appropriate weight to the well-reasoned opinion of Dr. Chouteau, a Board-certified osteopath specializing in orthopedic surgery.

Appellant alleges that her two-hour round trip commute exceeds Dr. Chouteau's restrictions. The Board finds appellant's claim to be without merit. In his August 17, 2004 work capacity evaluation, Dr. Chouteau indicated that appellant could operate a motor vehicle to/from work for one hour and operate a motor vehicle at work for one hour. Dr. Chouteau has clearly determined that appellant is capable of driving at least two hours per day. Her job does not require that she operate a motor vehicle. Therefore, her two-hour round trip commute is within her restriction. Moreover, she has provided no medical evidence that she is not able to drive to work as alleged. Appellant also contended that Dr. Chouteau's report was invalid due to discrepancies in the statement of accepted facts and the short duration of his examination. The Board finds that the minor discrepancies referenced by appellant were not a factor in Dr. Chouteau's determination of her work tolerance in 2004. Moreover, the length of Dr. Chouteau's examination was not determinative, in that his findings on examination were thorough and his report was well reasoned. Therefore, appellant has not established a reasonable basis for refusing the offered position.

The Office properly advised appellant in its December 29, 2004 letter that her reasons for refusing the offered position were not valid and that she must either accept the position within 15 days or face termination of her compensation benefits. However, appellant did not accept the position prior to the issuance of the January 13, 2005 decision terminating her monetary compensation benefits. As the weight of the medical evidence at the time of the January 13, 2005 decision established that appellant could perform the duties of the offered position, appellant did not offer sufficient justification for refusing the offered position. Therefore, the

[9] 5 U.S.C. § 8101(2); *Carmen Gould*, 50 ECAB 504 (1999).

Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective January 13, 2005 as she refused an offer of suitable work.[10]

Following the Office's termination of compensation benefits, the burden of proof in this case shifted to appellant,[11] who requested reconsideration and argued in her letter of January 7, 2005 that there was no indication that Dr. Chouteau had reviewed or approved the offered position regarding the driving restriction and stated that her physician had instructed her not to accept the position. None of the notes or letters from Dr. Bratcher submitted by appellant in support of her request for reconsideration addresses her ability to work and are, therefore, irrelevant. Accordingly, appellant has not established sufficient cause for refusing the offered position in this regard.

For all of the above-stated reasons, the Board finds that the Office's January 13 and April 7, 2005 decisions are correct under the law and the facts of this case.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective January 13, 2005 for refusing a suitable job offer.

[10] *Karen L. Yaeger*, 54 ECAB 323 (2003).

[11] *Rebecca L. Eckert*, 54 ECAB 183 (2002).

ORDER

IT IS HEREBY ORDERED THAT the April 7 and January 13, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 19, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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