United States Department of Labor
Employees' Compensation Appeals Board

S.G., Appellant	)	
and	)	**Docket No. 06-705**
	)	**Issued: August 14, 2006**
U.S. POSTAL SERVICE, PRIORITY MAIL CENTER, Tempe, AZ, Employer	)	

Appearances:
Dale Mackelprang, *Esq*., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On February 6, 2006 appellant, through her representative, filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs dated August 3, 2005 and January 31, 2006, denying modification of its termination of her compensation for refusing suitable work under 5 U.S.C. § 8106(c). 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 compensation under section 8106 on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On September 8, 2001 appellant, then a 46-year-old clerk, filed an occupational disease claim alleging that she sustained neuromas and burning pain in her feet due to factors of her federal employment. The Office accepted her claim for an aggravation of plantar fasciitis, bilateral plantar fascial fibromatosis and also accepted that she sustained strains and sprains of

the sacroiliac as a consequential injury.[1] Appellant worked in a limited-duty assignment following her injury until April 20, 2002, when she stopped work and did not return.[2]

In a progress report dated October 29, 2003, Dr. Brandon Kim, appellant's attending podiatrist, opined that her symptoms showed complex regional pain syndrome (CRPS) and reflex sympathetic dystrophy (RSD). He referred her to Dr. Kevin S. Ladin, a Board-certified physiatrist, for care and treatment.

In a report dated December 18, 2003, Dr. Ladin diagnosed a history of chronic bilateral foot pain, status post left plantar fascia release and nerve decompression, mechanical low back pain and no electrodiagnostic abnormalities of the lower extremities. He found that she could work full time in a sedentary position "where she is not required to walk or stand for more than very short periods of time."

By letter dated December 18, 2003, the Office referred appellant to Dr. Charanjit Dhillon, who is a Board-certified physiatrist and neurologist, for a second opinion evaluation.

On December 19, 2003 the employing establishment offered appellant a position as a modified clerk. The position required sitting 6 to 8 hours per day, standing 2 to 3 hours according to personal comfort and walking 1 to 2 1/2 hours according to personal comfort. The position further required lifting under 10 pounds less than 3 hours per day according to personal comfort and intermittent to continuous simple grasping for 6 to 8 hours per day. Appellant refused the position on December 22, 2003.

By letter dated December 23, 2003, the Office informed appellant that it had determined that the position offered by the employing establishment was suitable and provided her 30 days to accept the position or provide reasons for refusal. The Office notified her that she would be paid for any difference in pay between the offered position and her date-of-injury position and that an employee who refused or neglected suitable work was not entitled to further compensation.

By letter dated January 13, 2004, appellant, through her representative, argued that Dr. Ladin was not her attending physician. She submitted a progress report dated January 12, 2004 from Dr. Kim, transferring her care to Dr. Jeffrey A. Weiss, a podiatrist.

By letter dated January 21, 2004, the Office advised appellant that the evidence submitted was insufficient to show that she could not perform the duties of the offered position. The Office provided her 15 days to accept the position.

[1] Appellant underwent a left foot plantar fascial release of the abductor hallucis and neuroplasty of the medial calcaneal branch nerve on March 20, 2003.

[2] Appellant filed a notice of recurrence of disability on April 18, 2002 due to her accepted employment injury. The Office denied her claim by decision dated November 6, 2002, finding that the medical evidence was insufficient to establish that she sustained a recurrence of disability; however, the Office subsequently placed her on the periodic rolls beginning April 5, 2003.

In a report dated January 28, 2004, Dr. Dhillon, the Office referral physician, diagnosed bilateral foot pain of unclear etiology, status post foot surgery and probable mechanical back pain. He found normal objective findings on physical examination and possible "significant psychological overlay." Dr. Dhillon indicated that he could find no "injuries that would require limitations with regard to work." He referred appellant for a magnetic resonance imaging (MRI) scan study of the back.

In a report dated March 10, 2004, Dr. Ladin discussed appellant's complaints of severe pain in both feet and pain in her low back. He found no evidence of CRPS but tenderness of the plantar aspect of the feet and in the lumbar region. Dr. Ladin noted that an MRI scan showed a disc bulge at L4-5 and posterior annular tear. He found that he could offer appellant no further treatment and noted that he believed that her low back pain was mechanical in nature. Dr. Ladin stated: "From my perspective, [appellant] should be capable of working in a sedentary capacity so long as she is not required to stand or walk extensively and is afforded the ability to change positions intermittently to maintain a level of comfort."

In a supplemental report dated June 23, 2004, Dr. Dhillon noted that an MRI scan revealed an L4-5 annual tear and mild disc protrusion. He stated:

> "The above MRI [scan] can certainly explain her complaints of back pain but clearly has no relationship to her complaints of severe pain in her feet.
>
> "I reiterate my previously authored opinion that [her] complaints of severe foot pain cannot be explained on the basis of any objective findings on examination or diagnostic studies and most likely represents a significant psychological overlay.
>
> "Again, with regard to her foot pain, I see no evidence that should restrict her from returning to gainful employment."

On July 8, 2004 the employing establishment requested that Dr. Weiss review an enclosed job description and discuss whether appellant could perform the duties of the position. The modified clerk position required occasional lifting up to one pound, sitting, standing or walking as needed for personal comfort and intermittent to continuous simple grasping for five to eight hours per day.

By letter dated July 8, 2004, the Office requested that Dr. Weiss review Dr. Dhillon's second opinion evaluation and the July 8, 2004 modified clerk position from the employing establishment and discuss whether it was within appellant's physical capabilities.

On July 15, 2004 Dr. Weiss indicated that the job duties were in accordance with appellant's limitations. He stated: "I feel she can do duties related to sitting and handwork. She states [that] she cannot get there (to work) or move from station to station -- so I do [not] see her going to work."

On August 4, 2004 appellant accepted the offered position.

In a letter dated September 7, 2004, an official with the employing establishment indicated that appellant had accepted the position but then stated that she could not walk to the

building. In another letter received on September 10, 2004, a supervisor with the employing establishment, Bonnie Cross, related that on August 4, 2004 appellant called her from outside the building requesting a wheelchair to get into the building. Ms. Cross sought guidance from another supervisor, who said that she "needed to walk in to her job." Ms. Cross told appellant that she could not provide her with a wheelchair. Appellant maintained that she could do the job but not walk. Ms. Cross told her that she had to go home if she could not walk to her workstation.

In a report dated September 15, 2004, Dr. Anthony T. Yeung, a Board-certified orthopedic surgeon to whom the employing establishment referred appellant, diagnosed an annular tear unrelated to her foot condition. He noted that she had no ankle reflex and positive straight leg testing on the right. In a letter dated September 21, 2004, Dr. Yeung disagreed with Dr. Dhillon's finding that appellant had mechanical back pain and indicated that she "may have discogenic back pain" and noted that she had an "absent ankle reflex." He concurred with Dr. Dhillon's finding that he was unable to determine any injuries limiting her ability to work but also found that it was "unknown" whether she could perform her regular duty.

In a report dated November 5, 2004, Dr. Paul T. Daines, a podiatrist, diagnosed tarsal tunnel syndrome with RSD and found that appellant was "unable to work in a standing position or walk for long periods of time." He noted that she currently had to work standing up and walk a long way to work.

By decision dated December 29, 2004, the Office terminated appellant's compensation on the grounds that she refused an offer of suitable work. The Office determined that the employing establishment's December 19, 2003 job offer was suitable and the medical evidence showed that she was capable of performing the offered position.

On May 17, 2003 appellant, through her representative, requested reconsideration and submitted additional factual and medical evidence. In a decision dated August 3, 2005, the Office denied modification of its December 29, 2004 decision.

Appellant appealed to the Board on September 25, 2005 but subsequently requested that the appeal be dismissed in order to request reconsideration before the Office. The Board dismissed the appeal on January 3, 2006.[3]

By decision dated January 31, 2006, the Office denied modification of its suitable work termination.

[3] Order dismissing appeal, Docket No. 06-10 (issued January 3, 2006).

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation, including cases in which the Office terminates compensation under section 8106(c) for refusal of suitable work.[4]

Under section 8106(c)(2) of the Federal Employees' Compensation Act,[5] the Office may terminate compensation of an employee who refuses or neglects to work after suitable work is offered to or procured by or secured for the employee.[6] However, to justify such termination, the Office must show that the work offered was suitable and must inform the employee of the consequences of a refusal to accept employment deemed suitable.[7]

Section 10.516 of the Code of Federal Regulations states that the Office will advise the employee that the work offered is suitable and provides 30 days for the employee to accept the job or present any reasons to counter the Office's finding of suitability.[8] Thus, before terminating compensation, the Office must review the employee's proffered reasons for refusing or neglecting to work.[9] If the employee presents such reasons and the Office finds them unreasonable, the Office will offer the employee an additional 15 days to accept the job without penalty.[10]

ANALYSIS

The Office terminated appellant's compensation by decision dated December 29, 2004, on the grounds that she refused a December 19, 2003 offer of suitable employment. The employing establishment offered appellant a modified clerk position on December 19, 2003, which required sitting 6 to 8 hours per day, standing 2 to 3 hours according to personal comfort, walking 1 to 2 1/2 hours according to personal comfort, lifting under 10 pounds less than 3 hours according to personal comfort and intermittent to continuous simple grasping for 6 to 8 hours per day. Appellant refused the position on December 22, 2003. The Office determined that the position was suitable and, by letter dated December 23, 2003, provided her 30 days to accept the position or provide reasons for refusal. On January 21, 2004 the Office informed appellant that the evidence she submitted in support of her refusal was insufficient to show that the position was not suitable and provided her an additional 15 days to accept the position.

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[4] 5 U.S.C. § 8106(c); *Henry W. Sheperd, III*, 48 ECAB 382, 385 (1997); *Shirley B. Livingston*, 42 ECAB 855, 861 (1991).

[5] 5 U.S.C. § 8106(c)(2).

[6] *Les Rich*, 54 ECAB 290 (2003).

[7] *Karen L. Yaeger*, 54 ECAB 317 (2003); *Sandra K. Cummings*, 54 ECAB 493 (2003).

[8] 20 C.F.R. § 10.516.

[9] *See Sandra K. Cummings*, *supra* note 7; *see also Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992) and 20 C.F.R. § 10.516, which codifies the procedures set forth in *Moore*.

[10] *Id*.

On July 8, 2004 the Office and the employing establishment requested that Dr. Weiss review a job offer for another modified clerk position. The position required occasional lifting up to one pound, sitting, standing or walking as needed for personal comfort and intermittent to continuous simple grasping for five to eight hours per day. Dr. Weiss approved the position and, on August 4, 2004, appellant accepted the July 8, 2004 job offer. She arrived for work on August 4, 2004 and requested a wheelchair to get to her work location. A supervisor with the employing establishment sent her home because she could not walk to her workstation.

The Board finds that the Office did not follow its established procedures following the July 8, 2004 job offer from the employing establishment. It is well established that there are procedural requirements that are attached to the provisions of section 8106(c). Essential due process principles require that a claimant have notice and an opportunity to respond prior to termination under section 8106(c).[11] The Office did not follow these procedures and thus did not afford appellant the protections set forth by Board case law and by the Office's regulations.[12] Subsequent to the December 19, 2003 position which the Office found to be suitable, the employing establishment offered appellant another modified clerk position on July 8, 2004 with altered work requirements. The Office requested medical evidence from Dr. Weiss regarding whether she could perform the duties of the July 8, 2004 position. Appellant accepted the position and showed up at the building for work but did begin work or arrive at her workstation. The Office terminated her compensation on the grounds that she refused an offer of suitable work. Prior to terminating her compensation, however, the Office did not render a suitability determination on the July 8, 2004 position. Additionally, the Office failed to issue appellant a 30-day letter informing her that the position was suitable, that it was still available and that she had the opportunity to either accept the position or provide an explanation for refusing. The Office further did not consider any reasons for her refusal or neglect of the position and advise her that she had 15 days to accept the offer if her reasons were found unacceptable. Appellant, consequently, was not provided notice or an opportunity to respond with respect to a determination that she neglected suitable work.

As the Office failed to follow its established procedures subsequent to the employing establishment's July 8, 2004 job offer and prior to the December 29, 2004 decision terminating her compensation for refusing an offer of suitable work, the Board finds that the Office did not meet its burden of proof to terminate her compensation pursuant to section 8106(c).

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation under section 8106 on the grounds that she refused suitable work.

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[11] *Sandra K. Cummings*, *supra* note 7.

[12] *Juan A. Dejesus*, 54 ECAB 721 (2003) (essential due process principles require that a claimant have notice and an opportunity to respond prior to termination under section 8106(c)); 20 C.F.R. § 10.516.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 31, 2006 and August 3, 2005 are reversed.

Issued: August 14, 2006
Washington, DC

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

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