United States Department of Labor
Employees' Compensation Appeals Board

Z.S., Appellant	)	
and	)	**Docket No. 06-712**
	)	**Issued: December 20, 2006**
U.S. POSTAL SERVICE, POST OFFICE, New Orleans, LA, Employer	)	

Appearances:
Appellant, pro se,
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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 3, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated January 20, 2006, which affirmed a November 17, 2005 decision terminating her compensation 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 for wage loss and schedule award compensation benefits effective October 3, 2004 on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On January 12, 2000 appellant, then a 45-year-old distribution clerk, filed an occupational disease claim alleging that her left knee hurt from standing, bending and walking up and down stairs. The Office accepted the claim for left knee strain, medial meniscus tear and

subluxing patella.[1] Appellant underwent chondroplasty of the left knee on February 11, 2000. She was placed on the periodic rolls and received appropriate compensation benefits.[2]

Appellant returned to limited duty on May 17, 2003 with permanent restrictions. However, she had a recurrence of disability on June 3, 2003, which the Office accepted and stopped work.

On December 8, 2003 the Office received a report from appellant's treating physician, Dr. Earl J. Rozas, a Board-certified orthopedic surgeon, who opined that appellant could not work at the employing establishment because of her back and knee condition.

On December 9, 2003 the Office referred appellant for a second opinion, together with a statement of accepted facts, a set of questions and the medical record to Dr. Christopher E. Cenac, a Board-certified orthopedic surgeon.

In a report dated January 20, 2004, Dr. Cenac described appellant's history of injury and treatment. He found no objective evidence of orthopedic mechanical dysfunction causally related to the accepted factors involving the left knee. Dr. Cenac opined that appellant had reached maximum medical improvement. He advised that appellant was scheduled for a functional capacity evaluation (FCE) to determine her physical limitations and employment capabilities. In a February 4, 2004 addendum, Dr. Cenac noted that he had reviewed the FCE and advised that "[s]ymptom magnification and illness behavior was confirmed as suspected." He opined that appellant had reached maximum medical improvement and that she did not have any physical limitations causally related to the February 1, 1999 claim or recurrence. Dr. Cenac opined that appellant could return to her prior occupation as a distribution clerk without limitations.

By letter dated February 18, 2004, the Office requested that Dr. Rozas review the report of Dr. Cenac and provide his recommendation as to appellant's capacity to work for at least eight hours per day.

On March 5, 2004 the Office found a conflict in medical opinion. Dr. Rozas, the attending physician, opined that appellant continued to be partially disabled and could only work with restrictions in a sedentary position with a limited amount of pushing, pulling and lifting. Dr. Cenac, the referral physician, opined that appellant's work-related injury had resolved and that she could return to work for eight hours a day without restrictions.

On March 31, 2004 the Office referred appellant, together with a statement of accepted facts and the medical record, to Dr. George Chimento, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

[1] The Office also accepted a claim for a recurrence on October 3, 2001. Appellant stopped work at that time.

[2] In an April 19, 2002 decision, the Office denied appellant's claim for a schedule award. On April 4, 2003 appellant received a schedule award for a seven percent permanent impairment to the left upper extremity.

On April 16, 2004 Dr. Rozas stated that appellant's restrictions included permanent restrictions comprised of no carrying or lifting weights of more than 5 to 10 pounds and no standing, squatting or climbing stairs. He noted that on June 3, 2003 appellant related that her knee gave out while at work and that she could no longer work on a regular basis because of the difficulty in wearing a knee brace and using a cane for stability. Dr. Rozas indicated that the functional capacity evaluation indicated that appellant could do sedentary work with the restrictions that he already had in place.

In a report dated May 10, 2004, Dr. Chimento noted appellant's history of injury and treatment. He conducted a physical examination and determined that appellant ambulated with the aid of two crutches and was wearing a lace-up hinged knee brace. Dr. Chimento advised that there was no evidence of quadriceps atrophy and that she had healed arthroscopic incisions. He listed left knee range of motion from 0 to 125 degrees and no instability around the knee, a negative McMurray's test, a positive grind and tenderness over the patella tendon. Dr. Chimento also noted a soft calf, a negative Homan's test and a positive dorsalis pedis pulse. He also reviewed radiographs of the left knee and noted that they demonstrated minimal arthritic changes in the patellofemoral joint. Dr. Chimento diagnosed chondromalacia of the patella, status post arthroscopy. He opined that appellant's chondromalacia of the patella was still causing residual left knee pain; however, there were minimal objective findings. Dr. Chimento determined that appellant's work injury was currently disabling her from performing her position as a distribution clerk because residuals of the chondromalacia of the patella included pain with prolonged standing, sitting, climbing or squatting. However, he opined that appellant could work in a light sedentary capacity with limitations of sitting for up to six hours, walking of one hour and standing up to two hours. Dr. Chimento noted: "no standing more than 90 minutes without a 15-minute break, no sitting more than 90 minutes without a 15-minute break, no squatting, no kneeling and no stair climbing. [Appellant] is not to lift more than 25 pounds." Dr. Chimento advised that, if these restrictions could not be met, then appellant would be a candidate for vocational rehabilitation. He opined that appellant was capable of working light duty but could not return to regular-duty work as a distribution clerk.

On July 19, 2004 the employing establishment offered appellant a limited-duty position as a mail processing clerk with restrictions on standing of two hours or sitting of six hours, pushing and pulling of no more than 20 pounds for one hour and lifting for one hour but no lifting over 25 pounds. The modified assignment included 15-minute breaks every 90 minutes and indicated that there was no squatting, kneeling or climbing. Appellant refused the offer on August 6, 2004. She alleged that she had injuries to her lumbar and cervical spine and hip, as well as arthritis of the right knee. Appellant stated that Dr. Rozas advised that she could not work anymore.

By letter dated July 23, 2004, the Office advised appellant that it found the offered position to be suitable to her medical limitations and of the provisions of 5 U.S.C. § 8106. Appellant was advised that the position was suitable and in accordance with her medical limitations as prescribed by Dr. Chimento and that she had 30 days to accept the position. The

Office confirmed with the employing establishment that the modified position was available. If appellant failed to report to the offered position or failed to demonstrate that her rejection was not justified, her right to compensation could be terminated.[3]

On August 6, 2004 appellant rejected the job offer. In an August 24, 2004 electronic mail correspondence, the employing establishment advised the Office that appellant had not accepted the modified job offer.

By letter dated August 24, 2004, the Office advised appellant that it had received notice of her refusal to accept the offered position. It advised her that she had not provided a valid reason for refusing the job offer. The Office afforded appellant an additional 15 days in which to accept the position without penalty, noting that no further reasons for refusal would be considered. Appellant was advised that, if she still refused the offered position, she would face termination of her wage-loss compensation and schedule award benefits.

By decision dated September 7, 2004, the Office terminated appellant's entitlement to wage loss and schedule award benefits, effective October 3, 2004, on the basis that she refused suitable work. The Office determined that the report of Dr. Chimento, the impartial medical examiner, represented the weight of medical evidence.

On September 16, 2004 appellant filed a claim for a schedule award. The employing establishment controverted the claim based upon the termination of her compensation benefits. Appellant retired effective September 30, 2004.

The Office subsequently received a September 8, 2004 report, from Dr. Rozas who diagnosed chondromalacia of the left knee and a lumbar strain/sprain. Dr. Rozas opined that the period of partial disability was "indefinite" and that appellant would "never" be able to resume her regular or light duty. He noted that she could not do any "climbing, kneeling, bending, stooping, squatting, lifting, twisting [or] standing for long periods." Dr. Rozas also continued to treat appellant and provided treatment notes from May to March 2005. The Office also received copies of older treatment notes from 2003. In a February 1, 2005 report, Dr. Rozas repeated that appellant could never resume light work.

In a statement dated September 13, 2004, appellant objected to the Office's handling of her claim and termination of her benefits. She stated that she had filed for disability retirement on August 20, 2003 and that she could not work due to the deterioration of her condition as reported by Dr. Rozas.

In an April 12, 2005 report, Dr. Rozas opined that there was confusion regarding appellant's injuries and her disability rating. Regarding her ability to work, he noted that appellant had subjective complaints including pain to the left knee, constant pain in the low back and cervical spine, pain in the left hip, arthritis of the right knee with gait alteration and swelling

[3] In a memorandum of telephone call dated August 6, 2004, the Office noted that appellant had called to inquire regarding the status of her compensation which had stopped. It noted that her pay roll was deleted because she had been offered a suitable job offer. However, appellant noted that she had an appointment and the Office advised her that a payment would go out on August 13, 2004.

of the knee. This decreased her ability to stand, squat or climb stairs and that she was not allowed to carry or lift weights of more than 5 to 10 pounds. Dr. Rozas opined that, for "sometime now, she has not been able to work." In a May 3, 2005 attending physician's report, he reiterated that appellant could never resume light duty.

By letter dated August 13, 2005, appellant requested reconsideration.

By decision dated November 17, 2005, the Office denied modification of the September 7, 2004 decision. It noted that, while appellant submitted evidence supportive of her acceptance of disability retirement, she had not submitted sufficient medical evidence to establish that she could not work in the modified position.

By letter dated December 16, 2005, appellant requested reconsideration. She submitted a copy of a September 17, 2005 decision from the Social Security Administration, which granted her disability benefits commencing June 3, 2003.

By decision dated January 20, 2006, the Office denied modification of the November 17, 2005 decision.

LEGAL PRECEDENT

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits.[4] This includes cases in which the Office terminates compensation under section 8106(c)(2) of the Federal Employees' Compensation Act for refusal to accept suitable work.

Section 8106(c)(2)[5] of the Act 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. Section 10.517(a)[6] of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured for him or her has the burden to show that this refusal or failure to work was reasonable or justified. After providing the two notices described in section 10.516,[7] the Office will terminate the employee's entitlement to further compensation under 5 U.S.C. §§ 8105, 8106 and 8107, as provided by 5 U.S.C. § 8106(c)(2). However, the employee remains entitled to medical benefits as provided by 5 U.S.C. § 8103.[8] To justify termination, the Office must show that the work offered was suitable[9] and must inform appellant of the consequences of refusal to accept such

[4] *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

[5] 5 U.S.C. § 8106(c)(2).

[6] 20 C.F.R. § 10.517(a).

[7] 20 C.F.R. § 10.516.

[8] 20 C.F.R. § 10.517(b).

[9] *See Carl W. Putzier*, 37 ECAB 691 (1986); *Herbert R. Oldham*, 35 ECAB 339 (1983).

employment.[10] According to Office procedures, certain explanations for refusing an offer of suitable work are considered acceptable.[11] Retirement, however, is not considered an acceptable reason for refusing an offer of suitable work.[12]

ANALYSIS

In this case, Dr. Rozas disagreed with Dr. Cenac regarding the extent of appellant's disability and whether she could return to her regular distribution clerk position or perform other work due to her accepted left knee condition. The Office properly found a conflict in medical evidence which required a referral to an impartial medical specialist for resolution. The Act at 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

The Office referred appellant to Dr. Chimento for an impartial medical evaluation to resolve the conflict in opinion. Dr. Chimento performed a thorough evaluation of appellant. He provided a reasoned opinion that she was capable of working eight hours a day, in a limited capacity based on residuals of her accepted left knee condition. He provided restrictions for sedentary duty. Dr. Chimento's restrictions included limitations of no standing or sitting for more than 90 minutes without a 15-minute break. He also advised that appellant could not squat, kneel, climb stairs or lift over 25 pounds. Dr. Chimento opined that appellant was capable of working light duty but that she could not return to work as a distribution clerk. When a case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical opinion, the opinion of such specialist, if sufficiently well rationalized and based on a proper background, must be given special weight.[13] Dr. Chimento's opinion represented the weight of the medical evidence on the issue of appellant's ability to work and establishes that appellant was capable of working eight hours per day in a sedentary position.

The employing establishment offered appellant a sedentary position as a modified mail processing clerk. The position accommodated the work restrictions of Dr. Chimento. The Office reviewed the position and found it to be physically suitable for appellant.

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.[14] The Office properly followed its procedural requirements in this case. By letter dated July 23, 2004, the Office advised appellant

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[10] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(d)(1).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(1)-(5).

[12] *Robert P. Mitchell*, 52 ECAB 116 (2000) (where the claimant chose to receive disability retirement benefits rather than accept a position offered by the employing establishment).

[13] *Kathryn Haggerty*, 45 ECAB 383, 389 (1994); *Jane B. Roanhaus*, 42 ECAB 288 (1990).

[14] *See Maggie L. Moore*, *supra* note 10.

that the position was suitable and provided her 30 days to accept the position or provide reasons for her refusal. The Office notified appellant that the position was available and that she could accept it without penalty. It noted that a partially disabled employee who refused suitable work was not entitled to compensation. The record reflects that, on August 6, 2004, appellant refused the offer and alleged that she had injuries to her lumbar cervical spine and the hip, as well as arthritis to the right knee and noted that her physician, Dr. Rozas, advised her that she could not work anymore. The Office must consider preexisting and subsequently acquired conditions in determining the suitability of an offered position.[15] In this case, however, appellant did not submit medical evidence to establish that she was disabled due to the mentioned conditions which would prevent her from performing the sedentary duties. On August 14, 1004 the Office received confirmation from the employing establishment that appellant had not responded to the modified job offer.

By letter dated August 24, 2004, the Office properly informed appellant that her reasons for refusing the offered position were unacceptable and provided her 15 days to accept the position. She refused to do so. The Office properly terminated her wage-loss compensation for refusal of suitable work by decision dated September 7, 2004. At the time of the termination, the weight of the medical evidence established that appellant could perform the duties of the offered position.

An employee who refuses or neglects to work after suitable work has been offered to him or her has the burden of showing that such refusal to work was justified.[16] In the present case, appellant has not shown that her refusal to work was justified. The weight of the medical evidence supports that appellant's accepted left knee condition did not prevent her from performing the job she was offered on July 19, 2004. The medical reports received subsequent to the September 7, 2004 termination are insufficient to either overcome Dr. Chimento's opinion or create a new conflict in the medical evidence.

Dr. Rozas merely repeated his previously expressed opinion that appellant was unable to work due to her chondromalacia of the left knee and a lumbar strain/sprain. He was on one side of the conflict in medical opinion for which appellant was referred to Dr. Chimento.[17] In an April 12, 2005 report, Dr. Rozas noted that appellant was unable to work as she had subjective complaints which included pain in the left knee, pain in the low back and cervical spine, left hip and arthritis in the right knee, which decreased her ability to stand, squat or climb stairs and opined that appellant could not lift weights of more than 5 to 10 pounds. While he found appellant disabled, his opinion on her ability to work was essentially the same as his opinion that gave rise to the medical conflict that was resolved by Dr. Chimento. Dr. Rozas' other treatment notes, merely reiterated previous findings and repeated his opinion that she could not return to light-duty work. He did not provide the findings and rationale to support that appellant would

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

[16] 5 U.S.C. § 8106(c)(2).

[17] Submitting a report from a physician who was on one side of a medical conflict that an impartial specialist resolved is, generally, insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict. *Jaja K. Asaramo*, 55 ECAB 200 (2004).

have been unable to perform the limited-duty position during the time period it was offered and available to her.[18] Other medical reports submitted by appellant did not provide a specific opinion regarding appellant's ability to perform the offered position.

Following the termination of her benefits, appellant has not established that the offered position was outside of her physical recommendations. The Board finds that appellant did not meet her burden to show that her refusal to accept suitable work was justified.

In support of her claim, appellant also submitted a copy of a September 17, 2005 decision from the Social Security Administration approving her disability benefits, retroactive to June 3, 2003. To the extent that appellant refused the position because she was pursuing a disability retirement, the Board notes that retirement, is not considered an acceptable reason for refusing an offer of suitable work.[19]

The Board has held that termination of compensation under section 8106(c), for refusal of suitable work, serves as a bar to receipt of schedule award compensation for any period after the termination decision has been reached.[20] The Office terminated appellant's compensation on the grounds that she refused an offer of suitable work. She is not entitled to a schedule award.

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits effective October 3, 2004 and that appellant did not, thereafter, establish that her refusal of suitable work was justified.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation effective October 3, 2004 on the grounds that she refused an offer of suitable work.

[18] In order to establish causal relationship, a physician's report must present rationalized medical opinion evidence, based on a complete factual and medical background; *see Kathryn Haggerty*, 45 ECAB 383 (1994). Rationalized medical evidence is evidence which relates a work incident or factors of employment to a appellant's condition, with stated reasons of a physician; *see Gary L. Fowler*, 45 ECAB 365 (1994).

[19] *See supra* note 11.

[20] *See Stephen R. Lubin,* 43 ECAB 564, 573 (1992). *See also* 20 C.F.R. § 10.517(b) (the Office's termination decision under section 8106(c)(2) will terminate the employee's entitlement to compensation under 5 U.S.C. §§ 8105, 8106 and 8107).

ORDER

IT IS HEREBY ORDERED THAT the January 20, 2006 and November 17, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 20, 2006
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board