United States Department of Labor
Employees' Compensation Appeals Board

K.B., Appellant	)	
and	)	**Docket No. 06-1027**
	)	**Issued: December 15, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Little Rock, AK, 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 March 27, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' November 14, 2005 merit decision terminating her compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation effective November 14, 2005 on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On September 12, 1997 appellant, then a 32-year-old part-time rural carrier associate, filed an occupational disease claim alleging that she sustained injury to her back by carrying mail at work. She stopped work on August 30, 1997. The Office accepted that appellant sustained a lumbar sprain and lumbar herniated nucleus pulposus. She received appropriate compensation for periods of disability.

On December 17, 1997 appellant underwent a laminectomy and discectomy at L4-5 and on September 13, 1998 she underwent a repeat laminectomy at L4-5.[1] Both procedures were authorized by the Office.

In October 2000, the Office referred appellant to Dr. Scott Schlesinger, a Board-certified neurosurgeon, for further medical evaluation. In an October 26, 2000 report, Dr. Schlesinger stated that appellant did not exhibit any motor, sensory or reflex deficits but that her lumbar spine displayed decreased range of motion. He indicated that diagnostic testing did not show disc herniation or nerve root compression and stated that she could perform some type of limited duty. Dr. Schlesinger noted that appellant "complains of depression."

In an April 29, 2002 report, Dr. Thomas M. Ward, an attending Board-certified physical medicine and rehabilitation physician, stated that appellant reported "additional improvement in her depression subsequent to our increase of her Paxil at the time of her last visit three months ago."

In March 2005, the Office referred appellant to Thomas Rooney, a Board-certified orthopedic surgeon, for evaluation. In a report dated March 31, 2005, Dr. Rooney described appellant's medical history and noted that she reported that she had become "very depressed." He indicated that magnetic resonance imaging scan testing showed scar tissue and disc herniation at L4-5 with residual disc material in the neuroforamin bilaterally. Dr. Rooney stated that appellant did not show any motor or sensory changes, that her right ankle jerk was absent and that she had full painless range of motion in all extremities.[2] He indicated that appellant still had residuals of her employment injury but that she was capable of performing sedentary work for eight hours per day with no lifting more than five pounds.

On May 19, 2005 the employing establishment offered appellant a job as a modified rural carrier associate for 17 hours per week. The position involved answering telephone calls for up to one hour per day, performing clerical tasks for up to two hours and signing delivery personnel in and out of the premises for up to one hour. It required sitting, intermittent walking and simple grasping for up to 4 hours per day and pushing a lightweight roll-around cart, which could be pushed with one finger, for up to 30 minutes per day.

Appellant refused the offered position on May 27, 2005 indicating that she was "unable to function" due to extreme chronic pain.

In a report dated June 20, 2005, Dr. Charles V. Burton, an attending Board-certified orthopedic surgeon, stated that appellant's right ankle jerk was absent but that she showed no motor or sensory loss in her lower extremities. He indicated that she probably did not get a satisfactory response from her neurostimulator due to her use of narcotic medications. Dr. Burton stated that diagnostic testing showed adhesive arachnoiditis, which was consistent with appellant's pain complaints and concluded that she was totally incapacitated from all work.

[1] Appellant returned to limited-duty work for the employing establishment between March 1 and April 6, 1999.

[2] Dr. Rooney indicated that appellant's right ankle jerk was absent.

The Office determined that there was a conflict in the medical opinion between appellant's physician, Dr. Burton, and the government physician, Dr. Rooney, regarding the extent of her ability to work. In order to resolve the conflict, the Office referred appellant and the case record, including a statement of accepted facts, to Dr. Joseph Crow, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated August 15, 2005, Dr. Crow provided a description of appellant's medical history and noted that she reported that she was depressed about her medical condition.[3] He indicated that appellant got in and out of a chair without difficulty, walked with a normal gait and did a full squat to the floor. Dr. Crow stated that appellant's right ankle jerk was absent but that her reflexes were normal in her left ankle and both knees. He noted that she had right-sided hypesthesia in the L5 distribution and that bilateral straight leg raising produced low back discomfort, but that her motor examination was 5/5 in all muscle groups. Dr. Crow diagnosed status post lumbar laminectomy with chronic lumbar pain syndrome and right-sided sciatica, narcotic habituation and depression, which were all related to appellant's employment injury. He indicated that he had reviewed the job offered by the employing establishment on May 19, 2005 and determined that appellant was medically capable of performing this modified-duty position. Dr. Crow stated that his opinion on appellant's ability to work was based on a review of the medical records and the findings on physical examination and diagnostic testing.

In an accompanying work restrictions form, Dr. Crow stated that appellant could lift up to 10 pounds for 2 hours per day, push up to 20 pounds for 2 hours per day, pull up to 20 pounds for 2 hours per day and operate a motor vehicle at work for 2 hours per day. He indicated that appellant should spend less than an hour performing several activities, including twisting, bending, stooping, squatting and kneeling and that he should not engage in climbing. Dr. Crow stated that appellant could perform modified-duty work for eight hours per day.

On September 23, 2005 the employing establishment reoffered appellant the modified rural carrier associate position, which was initially offered on May 19, 2005. The duties and physical requirements of the position remained the same, but the hours of the position changed from 17 to 25 hours per week.

By letter dated September 26, 2005, the Office advised appellant of its determination that the modified rural carrier associate position was suitable and informed her that her compensation would be terminated if she did not accept the position or provide good cause for not accepting it within 30 days.

In an October 24, 2005 letter, appellant indicated that she could not accept the modified rural carrier associate position. She argued that Dr. Crow did not base his opinion on the statement of accepted facts and asserted that Dr. Crow was not impartial because a woman at Dr. Crow's office told her over the telephone on September 2, 2005 that the August 15, 2005 report "went back and forth with [the] Office" before it was mailed to her. Appellant also asserted that she had been diagnosed with depression and posited that she should have been referred for a psychiatric evaluation before she was offered a job. She submitted medical treatment notes, dated between June and August 2005, which detailed her use of medications.

[3] Dr. Crow indicated that appellant took the medications Elavil, Zanaflex, Zoloft, Methadone and Norco.

By letter dated October 26, 2005, the Office advised appellant that her reasons for refusing to accept the position offered by the employing establishment were invalid. It informed her that she had 15 days to accept the offered position if she wished to avoid termination of her compensation. Appellant did not accept the position within the allotted period.

By decision dated November 14, 2005, the Office terminated appellant's compensation on the grounds she refused suitable work.

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees' Compensation Act provides in pertinent part, "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[4] However, to justify such termination, the Office must show that the work offered was suitable.[5] An employee who refuses or neglects to work after suitable work has been offered to her has the burden of showing that such refusal to work was justified.[6] An offered position will generally not be considered suitable if it is temporary or seasonal in nature.[7]

Section 8123(a) of the Act provides in pertinent part: "If there is 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."[8] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[9] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[10]

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[4] 5 U.S.C. § 8106(c)(2).

[5] *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

[6] 20 C.F.R. § 10.124; *see Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

[7] *See* Federal (FECA) Procedure Manual, Part 2 -- Claim, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4b (July 1997).

[8] 5 U.S.C. § 8123(a).

[9] *William C. Bush*, 40 ECAB 1064, 1975 (1989).

[10] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

The Board has held that the medical opinion of an impartial medical specialist which is not premised on the statement of accepted facts is of diminished probative value.[11] It has also held that a physician selected by the Office to serve as an impartial medical specialist should be one wholly free to make a completely independent evaluation and judgment.[12]

ANALYSIS

The Office accepted that appellant sustained a lumbar sprain and lumbar herniated nucleus pulposus. In September 2005, the employing establishment offered appellant a job as a modified rural carrier associate and the Office terminated her compensation effective November 14, 2005 because she refused to accept this position without offering good cause for her refusal.

The evidence of record shows that appellant was capable of performing the modified rural carrier associate position offered by the employing establishment and determined to be suitable by the Office in September 2005. The position involved working for 25 hours per week, including the performance of such tasks as answering telephone calls for up to one hour per day, carrying out clerical tasks for up to two hours and signing delivery personnel in and out of the premises for up to one hour. It required sitting, intermittent walking and simple grasping for up to 4 hours per day and pushing a lightweight roll-around cart, which could be pushed with one finger, for up to 30 minutes per day. The record does not reveal that the offered position was temporary or seasonal in nature.[13] Appellant worked part time, Saturdays only, at the time of injury. The position offered was for part-time work.

The Office properly determined that there was a conflict in the medical opinion between Dr. Burton, appellant's Board-certified orthopedic surgeon and Dr. Rooney, a Board-certified orthopedic surgeon acting as an Office referral physician, regarding her ability to work. In a June 20, 2005 report, Dr. Burton stated that diagnostic testing showed adhesive arachnoiditis, which was consistent with appellant's pain complaints and concluded that she was totally incapacitated from all work. In contrast, Dr. Rooney indicated in a March 31, 2005 report that appellant still had residuals of her employment injury but that she was capable of performing sedentary work for eight hours per day with no lifting more than five pounds.

In order to resolve this conflict, the Office correctly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Crow, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on this matter.[14] In determining that appellant was

[11] *Charles F. Picuillo*, 38 ECAB 646, 651 (1987).

[12] *Daniel A. Davis*, 39 ECAB 161 (1987).

[13] *See supra* note 7 and accompanying text.

[14] *See supra* notes 8 and 9 and accompanying text.

physically capable of performing the modified rural carrier associate position, the Office properly determined that the well-rationalized opinion of Dr. Crow constituted the weight of the medical evidence with respect to this matter.[15]

In an August 15, 2005 report, Dr. Crow indicated that, apart from an absent right ankle jerk and a reported right-sided hypesthesia in the L5 distribution, appellant exhibited normal results upon sensory, strength and reflex testing. He diagnosed status post lumbar laminectomy with chronic lumbar pain syndrome and right-sided sciatica, narcotic habituation and depression. Dr. Crow indicated that he had reviewed the job offered by the employing establishment and determined that appellant was medically capable of performing such modified work. In an accompanying work restrictions form, he stated that appellant could lift up to 10 pounds for 2 hours per day, push up to 20 pounds for 2 hours per day, pull up to 20 pounds for 2 hours per day and operate a motor vehicle at work for 2 hours per day. Dr. Crow noted that appellant could perform modified-duty work for eight hours per day.

Dr. Crow provided rationale for his opinion that appellant could perform the modified rural carrier associate position by explaining that she exhibited limited objective findings on examination.[16] The work restrictions he recommended would allow appellant to perform the duties of the offered position. For example, the position required appellant to push a lightweight roll-around cart, which could be pushed with one finger, for up to 30 minutes per day and Dr. Crow's opinion that she could apply up to 20 pounds of pressure while pushing objects for 2 hours per day shows that she could perform this task.

The Board finds that the modified rural carrier associate position offered by the employing establishment is suitable. As noted above, once the Office has established that a particular position is suitable, an employee who refuses or neglects to work after suitable work has been offered to her has the burden of showing that such refusal to work was justified.[17] The Board has carefully reviewed the evidence and argument submitted by appellant in support of her refusal of the modified rural carrier associate position and notes that it is not sufficient to justify her refusal of the position.

Appellant argued that Dr. Crow did not base his opinion on the statement of accepted facts, but she did not provide support for this argument and Dr. Crow's opinion appears to have been based on a complete and accurate factual and medical history.[18] She asserted that Dr. Crow was not impartial because a woman at Dr. Crow's office told her over the telephone on September 2, 2005 that the August 15, 2005 report "went back and forth with [the] Office"

[15] *See supra* note 10 and accompanying text. In addition, the Board notes that there is no evidence that appellant was not vocationally and educationally capable of performing the offered position.

[16] Dr. Crow reviewed a copy of the modified rural carrier associate position, which was initially offered on May 19, 2005, but this position had the same duties and physical requirements as the position of the same name which was offered on September 23, 2003. The position offered on September 23, 2003 required 25 hours of work per week whereas the position offered on May 19, 2005 required 17 hours of work per week, but Dr. Crow indicated that appellant could perform 8 hours of modified work per day.

[17] *See supra* note 6 and accompanying text.

[18] *See supra* note 11 and accompanying text.

before it was mailed to her.[19] However, appellant did not provide evidence to establish this conversation as factual or adequately explain how it would show that Dr. Crow was biased. She also indicated that she had been diagnosed with depression and posited that she should have been referred for a psychiatric evaluation before she was offered a job. The Board notes that Dr. Crow provided no indication that appellant had an emotional condition which prevented her from performing the offered position and his diagnosis of depression appears to have been based more on appellant's reported complaints than specific findings on examination or testing.[20]

For these reasons, the Office properly terminated appellant's compensation effective November 14, 2005 on the grounds that she refused an offer of suitable work.[21]

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation effective November 14, 2005 on the grounds that she refused an offer of suitable work.

[19] *See supra* note 12 and accompanying text.

[20] The record contains very limited references to appellant's emotional complaints and that there is no medical report of a psychiatrist or clinical psychologist containing a diagnosis of an emotional condition. On appeal, appellant also argued that she had an addiction to narcotics, which prevented her from performing the position offered by the employing establishment. Dr. Crow detailed appellant's use of medications and diagnosed narcotic habituation, but he provided no indication that her use of medications prevented her from working as a modified rural carrier associate and the evidence of record does not otherwise support such a finding.

[21] The Board notes that the Office complied with its procedural requirements prior to terminating appellant's compensation, including providing appellant with an opportunity to accept the modified rural carrier associate position after informing her that her reasons for initially refusing the position were not valid; *see generally Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' November 14, 2005 decision is affirmed.

Issued: December 15, 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