United States Department of Labor
Employees' Compensation Appeals Board

MARY L. HENSON, Appellant	)	
and	)	**Docket No. 05-1964**
	)	**Issued: July 12, 2006**
U.S. POSTAL SERVICE, POST OFFICE, El Cajon, CA, Employer	)	

Appearances:
Thomas Martin, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge

JURISDICTION

On September 26, 2005 appellant filed a timely appeal from the decisions of the Office of Workers' Compensation Programs dated June 28, 2005 wherein the Office denied modification of the March 30, 2004 decision terminating appellant's compensation effective March 30, 2004 for the reason that she refused suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this decision.

ISSUE

The issue is whether the Office met its burden of proof, under 5 U.S.C. § 8106(c), to terminate appellant's compensation effective March 30, 2004 on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On November 20, 2000 appellant, then a 47-year-old modified letter carrier, filed an occupational disease claim alleging that she sustained "overuse of her neck and right shoulder" due to the fact that the chair she used in her federal duties did not fit properly. By letter dated

December 26, 2000, the Office accepted appellant's claim for sprain of the neck. On October 1, 2001 appellant underwent surgery on her neck.[1]

By letter dated January 2, 2003, the Office asked Dr. M. Hertzel Soumekh, a treating Board-certified neurosurgeon, to comment on appellant's ability to return to work. He responded in a medical report dated January 22, 2003 wherein he noted that appellant has chronic spine disease and has undergone multiple spine surgeries and upper extremity surgery by an orthopedic surgeon. Dr. Soumekh noted that appellant still complained of headaches, neck pain and a tingling sensation of both upper extremities. He indicated that appellant's motor function and vibratory sense was normal. Dr. Soumekh noted mild hypesthesia in both hands in the C6-7 distribution on sensory examination. He noted that appellant had good rotation of her neck to left and right, but severe limitation of flexion and extension to not more than 5 to 10 degrees. Dr. Soumekh indicated that appellant was much better than prior to surgery, but stated that appellant did not feel that she could safely and comfortably do her job with the employing establishment. He recommended referring appellant for vocational rehabilitation. In an accompanying work capacity evaluation, Dr. Soumekh limited appellant to 20 minutes of sitting an hour, pushing and pulling limited to 2 hours and lifting limited to 20 to 25 pounds. In a medical report dated March 5, 2003, he indicated that appellant was getting worse. Dr. Soumekh noted that appellant "cannot move her neck much to the right or left secondary to the fusion." He recommended that appellant stop driving.

On March 10, 2003 the employing establishment made a limited-duty job offer to appellant. On March 26, 2003 appellant's application for disability retirement was approved. On June 7, 2003 she rejected this job offer.

In an April 16, 2003 report, Dr. Soumekh opined that appellant's condition was recurrent, and that the most important work factors causing this condition were driving, pushing and having a poor workstation. In a duty status report of the same date, he indicated that appellant could not drive a motor vehicle. Dr. Soumekh limited sitting to 20 minutes an hour and pulling, pushing and fine manipulation to 1 hour a day. In a July 9, 2003 report, he indicated that appellant was not permanent and stationary, but also noted that appellant still complained of numbness of her jaw, popping in her right ear, grinding of her neck, neck pain, shoulder pain and numbness of the hands.

On October 14, 2003 the employing establishment made a revised job offer to appellant for a position as a modified letter carrier, effective November 1, 2003. The position was described as that of a lobby director/information person. She would be provided with an ergonomic chair and would be allowed to sit when there were no customers present. Appellant would not be asked to write or perform any computer input, but would only have to communicate with customers. It was noted that the position was within the restrictions of avoiding pushing, pulling, lifting or twisting with her right hand or grabbing repetitively. The employing establishment also noted that appellant would avoid over the shoulder reaching and neck flexing.

[1] Specifically, appellant underwent: (1) removal of the previous anterior cervical instrumentation at the level of C5-6; partial corpectomy C4-5 decompression cord anteriorly; and (3) reconstruction of the spine left iliac crest, anterior, cervical instrumentation syntheses.

In a report dated October 15, 2003, Dr. Soumekh stated, "I have reviewed the [employing establishment's job] offer and it appears pretty good to me, but [appellant] has to feel comfortable with that job. This is between her and you."

On October 29, 2003 appellant rejected the October 14, 2003 job offer.

The record contained a January 28, 2004 memorandum to the director of the Office indicating that the position of modified letter carrier was consistent with the work limitations as given by Dr. Soumekh on October 15, 2003, and was considered suitable. The claims examiner recommended that appellant be notified that the offered job had been determined to be suitable and advised of the provisions of 5 U.S.C. § 8106(c)(2) governing refusal of suitable employment.

In a February 20, 2004 letter to the Office claims examiner, appellant indicated that she was rejecting the latest job offer because she was on disability retirement and did not want to lose her status. She noted that she did attempt to return to work, but the job was never suitable as there was no ergonomic equipment, and that this aggravated her symptoms. Appellant also indicated that she did not want the job, stating: "I do not wish to go through the discomfort or stress anymore. I also do not find sitting or standing in the lobby all day, pointing my finger to tell customers where the forms are, which they already know, and listening to the rude comments to be a suitable job for me." She indicated that this job would just contribute to her depression.

By letter dated March 11, 2004, the Office notified appellant that her reasons for refusing the position were not valid. The Office advised her that the job remained available and provided appellant 15 additional days to accept the position, and stated that, if she had not accepted the position and arranged for a report date within 15 days of the letter, her entitlement to wage-loss and schedule award benefits would be terminated. Appellant did not respond within the time allotted.

By decision dated March 30, 2004, the Office terminated appellant's compensation benefits for the reason that appellant had refused suitable work, effective March 30, 2004.

On March 25, 2005 appellant requested reconsideration. In support thereof, appellant submitted new medical evidence. In a medical report dated November 11, 2004, Dr. Soumekh stated that appellant was complaining of increasing neck pain with radiation to her upper extremities. He noted that he was concerned that appellant was developing canal stenosis. In a report dated January 5, 2005, Dr. Soumekh indicated that the computerized tomography myelogram of the cervical spine did not show any nerve root compression or canal or foraminal stenosis.

In a report dated February 22, 2005, Dr. John B. Dorsey, a Board-certified orthopedic surgeon, stated:

> "While the requirements of this job appear to accommodate [appellant's] disabilities, based on my physical examination of [appellant] it is my opinion that because she has failed to respond to treatment that includes two anterior cervical fusion from C4-6 she continues to remain disabled. The evidence of continuous pain in her neck and both shoulders, headaches and radiating pain into her left upper extremity significantly impair her ability to lift, bend or twist.

"Lifting, bending and twisting are functions that she would be required to do as a lobby director. While she is permitted to stand which would give her some relief from back pain, this would not provide relief from neck pain. As a lobby director she would be engaging in continuous turning and twisting with her neck which would aggravate and cause her to develop further injury. The only job that I can see this woman being able to perform is a position where she would not have to bend or twist her neck and could sit in a somewhat stationary position with appropriate ergonomics at the station. This is not the case of a lobby director as I understand the job description. It is therefore my conclusion that she is not medically capable of performing the modified job offer of a lobby director."

By decision dated June 28, 2005, the Office found that the evidence submitted was not sufficient to warrant modification of the March 30, 2004 decision.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[2] In this case, the Office terminated appellant's compensation under section 8106(c)(2) of the Federal Employees' Compensation Act,[3] 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 narrowly construed as its 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]

Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the

[2] *Linda D. Guerrero*, 54 ECAB 556 (2003).

[3] 5 U.S.C. §§ 8101-8193.

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

[5] *Richard P. Cortes*, 56 ECAB __ (Docket No. 04-1561, issued December 21, 2004); *Ronald M. Jones*, 52 ECAB 190 (2000); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1972).

[6] *John F. Burke*, 54 ECAB 406 (2003).

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

[8] 20 C.F.R. § 10.516.

employee's ability to work establishing that a position has been offered within the employee's work restrictions and setting forth the specific job requirements of the position.[9] In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused by appellant was suitable.[10]

Once the Office establishes that the work offered is suitable, the burden shifts to the employee who refuses to work to show that the refusal or failure to work was reasonable or justified.[11] The determination of whether an employee is physically capable of performing a modified assignment is a medical question that must be resolved by medical evidence.[12] Office procedures state that acceptable reasons for refusing an offered position include medical evidence of inability to work.[13]

ANALYSIS

In the instant case, the Board finds that the Office improperly terminated appellant's compensation. Prior to terminating appellant's compensation for refusal to accept suitable work, the Office must show that the work was suitable and must inform appellant of the consequences of refusal to accept employment.[14] In the instant case, the record contains a January 28, 2004 internal memorandum to the Director indicating that the position of modified letter carrier was consistent with the work limitations as given by Dr. Soumekh and was considered suitable. The claims examiner recommended that appellant be notified that the offered job had been determined to be suitable and advised of the provisions governing refusal of suitable employment. However, there is no accompanying letter to appellant in the file. Although it is apparent that appellant received some form of correspondence from the Office as she responded in a February 20, 2004 letter, there is no indication that appellant was ever informed at this time of the serious consequences of her failure to accept the position, *i.e.*, of the penalty provision of 5 U.S.C. § 8106(c) and given 30 days to reply as required. Board precedent[15] and Office regulations[16] clearly establish that an appellant must be informed of the consequences of her refusal to accept such employment. Accordingly, as the record does not establish that appellant was given proper notification prior to the termination of her benefits in accordance with the Office's procedures, the decision terminating appellant's compensation must be reversed.

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[9] *See Linda Hilton*, 52 ECAB 476 (2001).

[10] *Id.*

[11] 20 C.F.R. § 10.517(a).

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

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity,* Chapter 2.814.5a.(3) (July 1997).

[14] *Maggie L. Moore, supra* note 5.

[15] *Richard P. Cortes, supra* note 5.

[16] 20 C.F.R. § 10.516.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation effective March 30, 2004 on the grounds that she refused an offer of suitable work under 5 U.S.C. § 8106(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 30, 2004 is reversed.

Issued: July 12, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board