United States Department of Labor
Employees' Compensation Appeals Board

LISA G. JOHNSON, Appellant	)	
	)	**Docket No. 06-377**
and	)	**Issued: July 5, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Coppell, TX, Employer	)	

Appearances:
Lisa G. Johnson, 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 December 5, 2005 appellant filed a timely appeal from an August 29, 2005 merit decision of the Office of Workers' Compensation Programs terminating her compensation benefits on the grounds that she abandoned suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation benefits effective September 23, 2004 on the grounds that she abandoned suitable work; and (2) whether appellant established that she had any employment-related total disability after September 23, 2004.

FACTUAL HISTORY

On June 22, 2001 appellant, then a 35-year-old automation clerk, filed an occupational disease claim alleging that on May 21, 2000 she first realized that a herniated disc at C4-5 with radiculopathy was caused by factors of her federal employment. She stopped work on May 21,

2000 and returned to limited-duty work, four hours a day, on May 19, 2001 but subsequently stopped. By letter dated August 6, 2001, the Office accepted appellant's claim for displacement of cervical intervertebral disc without myelopathy. The Office paid appropriate compensation.

The Office received a December 8, 2003 medical report of Dr. Peter B. Polatin, an attending Board-certified neurologist, who found that she could return to work in a modified capacity for at least four hours a day. He stated that the work should be sedentary in nature, that appellant was limited to lifting 10 pounds occasionally and she should be allowed to change her position at least once an hour as required.

On March 10, 2004 the employing establishment offered appellant a modified clerk position, which required her to work four hours a day based on the restrictions set forth in Dr. Polatin's December 8, 2003 report. The position required working in the nixie area and at a guard shack, repairing torn mail, answering telephones at the front desk and performing other duties as assigned within appellant's restrictions up to four hours a day. The physical requirements included sitting, walking, standing and reaching up to four hours a day.

On March 13, 2004 appellant returned to work under protest. She contended that she was uninformed about her medical limitations and she had not yet been released to return to work by Dr. Polatin or an employing establishment physician.

The employing establishment submitted an investigative memorandum dated April 9, 2004, which found that appellant performed activities such as shopping, attending her children's basketball games and driving her children to and from school, which were inconsistent with her claimed total disability. It requested that the Office refer her to a physician for a second opinion examination to determine her ability to perform limited-duty work. The employing establishment's memorandum was accompanied by several exhibits including, appellant's sworn affidavit in which she admitted to performing the activities observed by a postal investigator.

In an April 19, 2004 report, Dr. Polatin increased appellant's work hours from four to six hours a day.

By letter dated May 24, 2004, the Office advised Dr. Polatin of the employing establishment's investigative findings that appellant was currently working six hours a day. It requested that he address, among other things, whether she was capable of performing limited-duty work at least eight hours a day.

In a June 7, 2004 report, Dr. Polatin noted that appellant was doing fairly well working six hours a day and could work eight hours a day with her previous functional restrictions. In an accompanying work capacity evaluation of the same date, he stated that she could occasionally lift 10 pounds on an intermittent basis. Dr. Polatin recommended that appellant change her position once an hour.

On July 9 and 11, 2004 the employing establishment offered appellant the same modified clerk position that she accepted on March 13, 2004 for eight hours a day based on Dr. Polatin's June 7, 2004 report.

In a July 20, 2004 letter, the Office notified appellant that it had been informed that on May 8, 2004 she left the modified position she had accepted on March 13, 2004 with no apparent valid cause. The Office advised her that the eight-hour position was suitable and that, pursuant to 5 U.S.C. § 8106(c)(2), she had 30 days to either accept the job or provide an explanation for refusing the offer. The Office then advised appellant that her compensation would be terminated based on her refusal to accept a suitable position pursuant to section 8106(c)(2). It indicated that on June 20, 2004 it was informed by the employing establishment that the offered position remained available.

By letter dated August 19, 2004, appellant rejected the employing establishment's job offer, contending that she was forced by the employing establishment to return to work on March 13, 2004 without the benefit of any medical treatment from Dr. Polatin. She contended that the employing establishment told her to stay off the work floor until it was advised about her position and restrictions. Appellant contended that she had not recovered from her employment injuries and that she had not been cleared to return to work by either her attending physician or an employing establishment physician. She stated that she experienced unrelenting pain due to her untreated employment-related injuries since she had not received corrective surgery and/or medically necessary injections. Appellant noted that she was admitted to a hospital on May 14, 2004 where she remained for one week due to constant pain that grew progressively worse. She stated that the Office failed to consider her complaint that she was not being treated properly by Dr. Polatin and refused to allow her to change to a new physician. Appellant concluded that she was unable to report to duty at that time due to her medical conditions which were the proximate cause of her debilitating medical restrictions and that she had not been released to return to work.

In a September 2, 2004 letter, the Office advised appellant that her reasons for rejecting the employing establishment's job offer were not valid and that she had 15 days in which to accept the offered position or it would terminate her compensation.

The Office received a September 17, 2004 note from Dr. Saumil A. Mehta, a Board-certified internist, who indicated that appellant had not been to work since May 12, 2004 due to multiple problems. He stated that he did not see her in the office from June to September 2004. Dr. Mehta concluded that appellant was unable to work.

By decision dated September 23, 2004, the Office terminated appellant's compensation benefits effective that date on the grounds that she did not accept suitable work. It found that the medical evidence of record was insufficient to establish that she was unable to perform the duties of the offered position.

In a September 19, 2004 letter, received by the Office on September 23, 2004, appellant explained that she had responded within the Office's stated 15-day time period. She contended that the Office's September 2, 2004 letter was postmarked September 3, 2004 and that J. Wayne Johnson, her husband, retrieved the letter from her mailbox on September 6, 2004. Appellant argued that she had responded within 15 days from the date she actually received the September 2, 2004 letter. She agreed to accept the offered position and stated that she would return to work on September 20, 2004, noting that this was against the advice of Dr. Mehta and Dr. Pervaiz Rahman, a Board-certified internist. Appellant submitted Dr. Rahman's September 17, 2004 note, which indicated that she had been under his care since June 9, 2004 for

abdominal pain. She underwent an endoscopy and colonoscopy on June 23 and 30, 2004 and stated that she was last seen on September 17, 2004.

In a letter dated November 4, 2004, appellant requested an oral hearing before an Office hearing representative.

By decision dated February 11, 2005, the Office's Branch of Hearings and Review denied appellant's request for an oral hearing as untimely. It exercised its discretion and denied her hearing request on the basis that the issue in the case could be resolved by requesting reconsideration and submitting additional evidence establishing that she did not abandon suitable work.

In a May 12, 2005 letter, appellant requested reconsideration of the Office's September 23, 2004 and February 11, 2005 decisions. She submitted a May 5, 2005 medical report of Dr. William R. Hudgins, a Board-certified neurosurgeon. He provided a history of her neck and bilateral shoulder pain beginning on May 21, 2000 and her medical treatment. Dr. Hudgins reported his findings on physical examination. He reviewed a September 24, 2004 magnetic resonance imaging (MRI) scan of the cervical spine and found multilevel disc bulges but nothing contacting a nerve root or spinal cord. Dr. Hudgins did not see a surgically treatable disc herniation. He reviewed a September 2004 MRI scan of appellant's right shoulder, which showed a small partial thickness tear in the supraspinatus/infraspinatus tendon junction with some tendinitis and associated mild bursitis, which indicated a possible rotator cuff problem. Dr. Hudgins diagnosed post-traumatic chronic neck and back ache and possible functional overlay, to which he assigned a score of three. He noted that this was usually associated with elevations in the hysteria or depression scale on the full fledged Minnesota Multiphasic Personality Inventory test. He provided appellant's treatment plan for her neck pain and recommended evaluation of her left shoulder.

Appellant submitted a June 21, 2005 duty status report, which contained an illegible signature. It diagnosed chronic pain and indicated that she was advised to resume work on May 23, 2005.

A July 25, 2005 report of Dr. Ken Reed, a Board-certified neurologist, noted that appellant had upper back, neck and bilateral arm pain, which had developed slowly over time. He provided a history of her medical treatment and family and social background. Dr. Reed reported his findings on physical examination and diagnosed cervical radiculopathy. He recommended that appellant undergo a course of steroid injections as treatment for her pain. In an August 17, 2005 report, Dr. Reed reiterated his diagnosis of cervical radiculopathy and recommendations for cervical facet injections.

By decision dated August 29, 2005, the Office denied modification of the September 23, 2004 decision. It found that the evidence submitted was insufficient to establish that she was incapable of working eight hours a day within the restrictions in the offered modified clerk position.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act provides at section 8106(c)(2) that a partially disabled employee who refuses or neglects to work after suitable work is offered is not entitled to compensation.[1] Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits under section 8106 for refusing to accept or neglecting to perform suitable work.[2] The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to future compensation and, for this reason, will be narrowly construed.[3] To establish that a claimant has abandoned suitable work, the Office must substantiate that the position offered was consistent with the employee's physical limitations and that the reasons offered for stopping work were unjustified.[4] The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence of record.[5]

Section 10.516 of the Code of Federal Regulations states that the Office will advise the employee that the work offered is suitable and provide 30 days for the employee to accept the job or present any reasons to counter the Office's finding of suitability.[6] Thus, before terminating compensation, the Office must review the employee's proffered reasons for refusing or neglecting to work.[7] 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. The Board has clarified that, in cases where compensation is terminated pursuant to section 8106(c), the essential requirements of due process, notice and an opportunity to respond apply not only where an employee refuses suitable work, but also apply in the same force to cases where an employee abandons suitable work.[8]

ANALYSIS -- ISSUE 1

Appellant initially accepted the offered modified clerk position, four hours a day, on March 13, 2004 and later worked in this same position six hours a day until May 8, 2004. The Office found that the employing establishment's July 2004 offer for the same modified clerk

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[1] 5 U.S.C. § 8106(c)(2).

[2] *See Bryant F. Blackmon*, 56 ECAB ___ (Docket No. 04-564, issued September 23, 2005); *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

[3] *See Richard P. Cortes*, 56 ECAB ___ (Docket No. 04-1561, issued December 21, 2004); *H. Adrian Osborne*, 48 ECAB 556 (1997).

[4] *See Wayne E. Boyd*, 49 ECAB 202 (1997).

[5] *See John E. Lemker*, 45 ECAB 258 (1993); *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

[6] 20 C.F.R. § 10.516.

[7] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff d on recon.*, 43 ECAB 818 (1992).

[8] *Mary A. Howard*, 45 ECAB 646 (1994); *see also Jessie L. Trujillo*, Docket No. 04-1887 (issued January 24, 2005).

position, eight hours a day, was suitable based on a June 7, 2004 medical report of Dr. Polatin, her attending physician, who found that appellant was doing fairly well working six hours a day and could work eight hours a day within her work limitations. He permitted her to occasionally lift 10 pounds on an intermittent basis and recommended that she change her position once an hour.

The modified clerk position required working in the nixie area and at a guard shack, repairing torn mail, answering telephones at the front desk and performing other duties as assigned within appellant's restrictions up to eight hours a day. The physical requirements included sitting, walking, standing and reaching up to eight hours a day.

Dr. Polatin was aware that appellant had been performing the duties of the modified clerk position for six hours a day. He opined that she was capable of performing these same work duties eight hours a day within her stated physical restrictions. The Board finds that the offered position was medically suitable to appellant's physical limitations. Contrary to appellant's contention that she had not been released to return to work by her attending physician, the record shows that Dr. Polatin released her to return to work as early as December 8, 2003, four hours a day and increased her work hours to six hours a day on April 19, 2004 and then to eight hours a day as of June 7, 2004. The full-time position offered by the employing establishment conformed to these medical restrictions.

Appellant submitted Dr. Mehta's report, which found that she had not worked since May 12, 2004 due to multiple problems and that she was unable to work. Dr. Mehta, however, failed to address whether appellant had disability for work. He did not indicate that he had reviewed a description of the offered position. The Board finds that Dr. Mehta's report is insufficient to establish that appellant was not able to perform the eight-hour position.

The Office properly informed appellant, by letter dated September 2, 2004, that her reasons for refusing the modified position were unacceptable and provided her 15 days to accept the position. She refused to do so and, thus, the Office properly terminated her compensation for failure to accept suitable work.

LEGAL PRECEDENT -- ISSUE 2

As the Office met its burden of proof to terminate appellant's compensation benefits, the burden shifted to her to establish that she had any disability causally related to her accepted injury after termination of compensation benefits.[9] To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence, based on a complete factual and medical background, supporting such a causal relationship.[10] Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.[11] Rationalized medical evidence is medical evidence which includes a physician's

[9] *See Manuel Gill*, 52 ECAB 282 (2001).

[10] *Id.*

[11] *Elizabeth Stanislav*, 49 ECAB 540 (1998).

rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[12]

ANALYSIS -- ISSUE 2

In support of her employment-related disability, appellant submitted medical reports from Dr. Rahman, Dr. Hudgins and Dr. Reed, which found that she suffered from cervical and abdominal pain. These reports, however, do not contain an opinion as to whether appellant was disabled due to her accepted employment-related displacement of cervical intervertebral disc without myelopathy and, thus, unable to work eight hours a day as a modified clerk. The Board finds that this evidence is insufficient to establish appellant's burden of proof.

A June 21, 2005 report containing an illegible signature diagnosed chronic pain and indicated that on May 23, 2005 appellant had been advised that she could return to work. The Board finds that this report has no probative value because it cannot be verified that it was signed by a physician.[13] As the report lacks proper identification, it does not establish that appellant was totally disabled for work after September 23, 2004.[14]

As appellant has not submitted rationalized medical evidence establishing that she had any disability after September 24, 2004 causally related to her accepted employment-related condition, she has not met her burden of proof.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation benefits effective September 23, 2004 on the grounds that she abandoned suitable work. The Board further finds that appellant failed to establish that she had any employment-related total disability after September 23, 2004.

[12] *Leslie C. Moore*, 52 ECAB 132 (2000); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[13] *Ricky S. Storms*, 52 ECAB 349 (2001).

[14] *Vickey C. Randall*, 51 ECAB 357 (2000); *Merton J. Sills*, 39 ECAB 572 (1988). (Reports not signed by a physician lack probative value.)

ORDER

IT IS HEREBY ORDERED THAT the August 29, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 5, 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