United States Department of Labor
Employees' Compensation Appeals Board

DANITA Y. COACH, Appellant	)	
and	)	**Docket No. 06-420**
	)	**Issued: June 6, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, Employer	)	

Appearances:
Danita Y. Coach, 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 13, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' November 17, 2005 merit decision, terminating her compensation benefits on the grounds that she refused an offer of suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, this 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 benefits effective November 26, 2005, on the grounds that she refused an offer of suitable employment.

FACTUAL HISTORY

On March 10, 1993 appellant, then a 41-year-old clerk, filed a notice of traumatic injury alleging that she injured her back and shoulder while loading mail on to equipment in the performance of duty. The Office accepted her claim for right shoulder and low back strains and appellant was placed on the periodic rolls. She returned to light duty on January 13, 2004.

Subsequently, appellant claimed a recurrence of disability, which was accepted by the Office on December 30, 2004. Appellant's original claim was expanded to include impingement syndrome of the right shoulder with partial rotator cuff tear.

Appellant was treated by Dr. Evelyn D. Witkin, a Board-certified orthopedic surgeon. On February 9, 2005 she stated that appellant remained disabled at that time, mainly due to low back pain. In an April 19, 2005 work capacity evaluation, Dr. Witkin indicated that appellant could work four hours per day in a sedentary position. The recommended restrictions included no reaching above the shoulder, no twisting, no repetitive movements of the wrist and elbows, no operating a motor vehicle. Appellant was also limited to lifting no more than five pounds for two hours per day.

On April 25, 2005 the employing establishment offered appellant a limited-duty position of modified clerk that accommodated the restrictions outlined by Dr. Witkin. Duties included casing flat mail with her left arm for four hours per day and sedentary work to be performed at appellant's own pace. The position description reflected that appellant would not be required to pull, push, squat, kneel, climb, reach above the shoulder, twist or operating a motor vehicle; sit, walk, stand or lift more than two hours per day; or perform repetitive movements of the wrist or elbows. The position assignment provided for 10-minute breaks every 2 hours.

On a disability certificate dated May 3, 2005, Dr. Witkin stated that appellant was "still unable to work." She had reviewed the April 25, 2005 job offer and believed it would be suitable "once patient's back pain quiets down."

The Office referred appellant to Dr. Kevin Hanley, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated May 26, 2005, Dr. Hanley opined that appellant had no residuals as a result of the March 4, 2003 work-related injury and that she was capable of working eight hours per day. Dr. Hanley recommended that appellant be restricted from lifting more than 30 pounds for six months. He opined that appellant's subjective symptomology was not supported by objective findings, stating that her back motion was "limited by intent." Dr. Hanley noted that range of motion in her shoulder was excellent, with abduction and forward flexion in the range of 170 degrees, external rotation of 80 degrees and internal rotation of 50 degrees. In an accompanying work capacity evaluation, Dr. Hanley indicated that appellant could work 8 hours per day, provided that she lifted no more than 30 pounds for the next 6 months.

In a July 5, 2005 report, Dr. Witkin disagreed with Dr. Hanley's opinion, expressing her belief that appellant could not lift 80 pounds or work an 8-hour day. She opined that appellant could return to work four hours per day in a position that did not require any "above-shoulder activity and was suitable to her low back complaints." She added that appellant would not be able to case mail, an activity that required bending her wrist and using her arm on a repetitive basis. In an accompanying work capacity evaluation, Dr. Witkin opined that appellant could work 4 hours per day, provided that she was restricted from pushing, pulling and lifting more than 5 to 10 pounds for more than 2 hours per day and from making repetitive movements of the wrist and elbows. She recommended that appellant be permitted to take 10-minute breaks every 2 hours.

On July 28, 2005 the employing establishment offered appellant a limited-duty position as a modified clerk. The position description reflected that the job was sedentary and involved casing flat mail weighing less than 10 ounces in holdout slots for four hours per day. Physical requirements included reaching, twisting, sitting, walking, standing and reaching above the shoulder no more than 4 hours; no repetitive movements of the wrists or elbows; and no pushing, pulling or lifting more than 5 to 10 pounds for more than 2 hours. The restrictions provided for 10-minute breaks every 2 hours.

The Office found a conflict between the opinions of Dr. Hanley and Dr. Witkin. In order to resolve the conflict in medical opinion, the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Bong Lee, a Board-certified orthopedic surgeon, for an impartial medical examination. Dr. Lee reviewed the medical evidence of record and conducted an examination of appellant. In a report dated September 8, 2005, he opined that appellant was able to return to work, within the restrictions outlined in an accompanying work capacity evaluation. Dr. Lee indicated that appellant had full range of motion of the right shoulder with no complaint of pain. He found minimal tenderness over the acromioclavicular (AC) joint, but no palpable mass or instability. The strengths of adduction and the shoulder girdle muscles of the right shoulder were found to be adequate and compatible with the left. Dr. Lee's neurological examination of appellant's lower extremities revealed no sensory deficit awareness. He stated that, in a prone position, appellant had no tenderness of the interspinous process or the sciatica notch. In the supine position, all of the major articulations demonstrated a full range of motion with no complaints of pain, no joint tenderness, swelling or instability. On standing, the curvature of the lumbosacral spine was normal. Dr. Lee noted that forward bending was performed cautiously and the curve was reversed fully, but that appellant complained of pain at the extreme of this motion. The muscles were found to be taught, but not in true spasm. Dr. Lee provided a diagnosis of chronic sprain/strain of the lumbosacral spine status postoperative acromioplasty and repair of rotator cuff of the right shoulder, with excellent results. He opined that appellant had no disability with regard to her shoulder and that restrictions were mainly due to cumulative repetitive low back injuries. Dr. Lee recommended that appellant be restricted from reaching above the shoulder more than 6 hours per day; walking, standing or twisting more than 4 hours per day; operating a motor vehicle more than 2 hours per day; pushing more than 20 pounds more than 4 hours per day; and pulling or lifting more than 20 pounds more than 3 hours per day.

By letter dated September 22, 2005, the Office notified appellant that it found the modified clerk position offered to appellant on July 28, 2005 to be suitable based on Dr. Lee's September 8, 2005 report. The Office advised appellant that she had 30 days to accept the offer or provide reasons why she believed the position was not suitable.

Appellant submitted a disability certificate dated October 15, 2005 from Dr. Witkin, who indicated that appellant was "disabled from October 18, 2005 [--] ongoing" and was unable to perform the duties described on the July 28, 2005 job description. In an October 18, 2005 letter, Dr. Witkin stated that the position offered was not a sedentary position and that casing mail in overhead slots would aggravate appellant's right shoulder. She also opined that constant sitting and reaching would be "difficult."

By letter dated October 24, 2005, the Office advised appellant that she had failed to provide valid reasons for refusing to accept the limited-duty job and that, if she had not accepted the position and arranged for a report date within 15 days of the date of the letter, her entitlement to wage loss and schedule award benefits would be terminated.

In an October 25, 2005 letter, Dr. Witkin reiterated her opinion that the position of modified clerk was not suitable for appellant. She contended that recurrent overhead activity required by casing mail in holdout slots and prolonged sitting and reaching on a regular basis would aggravate appellant's low back and right shoulder conditions.

By decision dated November 17, 2005, the Office terminated appellant's wage-loss and schedule award benefits effective November 26, 2005, on the grounds that she refused an offer of suitable work.[1]

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[2] Section 8106(c)(2) of the Federal Employees' Compensation 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.[3] To justify termination of compensation, the Office must show that the work offered was suitable and must inform the claimant of the consequences of refusal to accept such employment.[4] Section 8106(c) will be narrowly construed as it 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.[5]

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.[6] 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.[7]

The Act provides that, 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

[1] Appellant submitted documents subsequent to the Office's November 17, 2005 final decision. The Board does not have jurisdiction to review this evidence for the first time on appeal as its review of a case is limited to the evidence in the case record, which was before the Office at the time of its final decision; *see* 20 C.F.R. § 501.2(c).

[2] *Linda D. Guerrero*, 54 ECAB 556 (2003); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[3] 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

[4] *Ronald M. Jones*, 52 ECAB 190 (2000); *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

[5] *Joan F. Burk*e, 54 ECAB 406 (2003); *see Robert Dickerson*, 46 ECAB 1002 (1995).

[6] 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 4.

[7] 20 C.F.R. § 10.516.

a third physician who shall make the examination.[8] The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[9]

When a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[10]

ANALYSIS

The Board finds that the Office properly terminated appellant's compensation under 5 U.S.C. § 8106(c)(2) for refusing an offer of suitable work.

On April 19, 2005 Dr. Witkin opined that appellant remained partially disabled due to residuals of her accepted March 4, 1993 employment injury and would be able to work only in a sedentary position four hours per day. She advised that appellant not be required to reach above the shoulder, twist, perform repetitive movements of the wrists and elbows, operate a motor vehicle or lift more than five pounds for two hours per day. However, on May 3, 2005 after reviewing a limited-duty job offer presented by the employing establishment that accommodated her restrictions, Dr. Witkin opined that appellant was "still unable to work." She had reviewed the April 25, 2005 job offer and believed it would be suitable "once patient's back pain quiets down." In a second opinion report, Dr. Hanley found that there was no objective evidence to support any ongoing residuals of appellant's diagnosed conditions and that she was capable of working eight hours per day, provided that she should not be required to lift more than 30 pounds for 6 months. Dr. Witkin disagreed with Dr. Hanley's opinion, contending that appellant could return to work only 4 hours per day, provided that she was also restricted from pushing, pulling and lifting more than 5 to 10 pounds for more than 2 hours per day and from making repetitive movements of the wrist and elbows. She recommended that appellant be permitted to take 10-minute breaks every 2 hours. The Office properly found that a conflict arose between Dr. Witkin and Dr. Hanley.

On July 28, 2005 the employing establishment offered appellant a limited-duty position as a modified clerk. The position description reflected that the job was sedentary and involved casing flat mail weighing less than 10 ounces in holdout slots for 4 hours per day. Physical requirements included reaching, twisting, sitting, walking, standing and reaching above the shoulder no more than 4 hours; no repetitive movements of the wrists or elbows; and no pushing, pulling or lifting more than 5 to 10 pounds for more than 2 hours. The restrictions provided for 10-minute breaks every 2 hours.

[8] 5 U.S.C. § 8123.

[9] 20 C.F.R. § 10.321 (1999).

[10] *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

In order to resolve the conflict between the opinions of appellant's treating physician and the second opinion physician, the Office referred appellant to Dr. Lee for an impartial medical examination. In a September 8, 2005 report, after reviewing the medical evidence of record and conducting a thorough examination, Dr. Lee described the history of appellant's condition and his findings in detail. He concluded that appellant was able to return to work, provided that her job required no more than 6 hours of reaching above the shoulder; 4 hours of walking, standing or sitting; 2 hours of operating a motor vehicle; 4 hours of pushing more than 20 pounds; and 3 hours of pulling or lifting more than 20 pounds. Dr. Lee indicated that appellant had full range of motion of the right shoulder with no complaint of pain. He found minimal tenderness over the AC joint, but no palpable mass or instability. The strengths of adduction and the shoulder girdle muscles of the right shoulder were found to be adequate and compatible with the left. Dr. Lee's neurological examination of appellant's lower extremities revealed no sensory deficit awareness. He stated that in a prone position, appellant had no tenderness of the interspinous process or the sciatica notch. In the supine position, all of the major articulations demonstrated a full range of motion with no complaints of pain, no joint tenderness, swelling or instability. On standing, the curvature of the lumbosacral spine was normal. Dr. Lee noted that forward bending was performed cautiously and the curve was reversed fully, but that appellant complained of pain at the extreme of this motion. The muscles were found to be taught, but not in true spasm. Dr. Lee provided a diagnosis of chronic sprain/strain of the lumbosacral spine status postoperative acromioplasty and repair of rotator cuff of the right shoulder, with excellent results. He opined that appellant had no continuing disability with regard to her shoulder and that restrictions were mainly due to cumulative repetitive low back injuries. The Board finds that Dr. Lee's report was thorough, well rationalized and based on a proper factual and medical background.

On September 22, 2005 the Office notified appellant that it had determined the modified clerk position offered by the employing establishment on July 28, 2005 to be suitable based on Dr. Lee's restrictions. It allowed her 30 days to accept or to present reasons for refusing the position. In response, appellant submitted a disability certificate dated October 15, 2005 from Dr. Witkin, who indicated that appellant was disabled "from October 18, 2005 [--] ongoing" and was unable to perform the details described on the July 28, 2005 job description. In an October 18, 2005 letter, Dr. Witkin stated that the position offered was not a sedentary position and that casing mail in overhead slots would aggravate appellant's right shoulder. She also opined that constant sitting and reaching would be "difficult."

The Board finds that the report of the impartial medical specialist, which is well rationalized and based on a thorough review of the record and a comprehensive examination of appellant, is persuasive. Dr. Lee's opinion is entitled to special weight and represents the weight of the medical evidence. It establishes that appellant was able to perform modified duty that accommodated his recommended restrictions. The Board finds that the opinion of Dr. Witkin is insufficient to overcome the special weight accorded to Dr. Lee's opinion or to create a new medical conflict. Dr. Witkin was on the one side of the conflict resolved by Dr. Lee.[11] Her reports did not contain new findings or rationale but essentially duplicated her prior opinion in this case.

[11] *See Michael Hughes*, 52 ECAB 387 (2001); *Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992); *Dorothy Sidwell*, 41 ECAB 857 (1990).

The Office found that the limited-duty job to be suitable in that it accommodated the restrictions delineated by Dr. Lee. 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 medical evidence.[12] The record demonstrates that the physical capacity required for the modified clerk position was within appellant's work restrictions, as identified by Dr. Lee. On October 24, 2005 the Office informed appellant that she had failed to provide valid reasons for refusing the offered position and allowed her 15 additional days to accept the position. The Board finds that the Office met its burden of proving that the work offered was suitable and that appellant was informed of the consequences of her refusal to accept the offered employment.[13] When she failed to accept the position within the prescribed 15 days, the Office properly terminated her benefits.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective November 26, 2005 for refusing a suitable job offer.

ORDER

IT IS HEREBY ORDERED THAT the November 17, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 6, 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

[12] *Marilyn D. Polk*, 44 ECAB 673 (1993).

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