

on October 25, 2001. The Office accepted appellant's claim for lumbosacral sprain with left radiculopathy¹ and placed her on the periodic rolls effective April 12, 2003.²

In a report dated July 13, 2004, Dr. E.W. Wassef, a Board-certified orthopedic surgeon and appellant's attending physician, found that she was "permanent and stationary." He noted that a February 7, 2002 magnetic resonance imaging (MRI) scan study revealed evidence of a prior laminectomy at L5, a small L3-4 central disc bulge and moderate facet arthropathy at L4-5.³ Dr. Wassef diagnosed lumbar pain syndrome secondary to a lumbar laminectomy at L5-S1, chronic lumbar musculoligamentous strain with left radiculopathy and degenerative disc disease at L3-4, L4-5 and L5-S1. He restricted appellant from performing "heavy work" or work requiring "prolonged weightbearing and sitting." Dr. Wassef attributed her disability to her employment.

On August 6, 2004 the employing establishment offered appellant the position of modified carrier technician. The position required sitting, walking and standing for 6 hours per day, pushing, pulling and lifting up to 20 pounds and no prolonged sitting or weight bearing. Dr. Wassef reviewed the position and opined that she could perform the job with no continuous sitting or weight bearing for over 2 hours and no lifting over 25 pounds. The employing establishment amended the job offer on August 9, 2004 to conform to Dr. Wassef's restrictions. The amended job offer specified that appellant would not perform "continuous/prolonged weight bearing and sitting over 2 hours" or lifting over 25 pounds.

By letter dated August 9, 2004, the Office informed appellant that it had determined that the position offered by the employing establishment was suitable and provided her 30 days to accept the position or provide reasons for her refusal. The Office notified her that she would be compensated for any difference in pay between the offered position and her date-of-injury position, that she could accept the job without penalty and that an employee who refused or neglected suitable work was not entitled to further compensation.

In a letter dated August 17, 2004, appellant refused the position. She related that on August 9, 2004 she injured her lower back and left leg when her "left leg gave out" while she was going down the stairs. Appellant was diagnosed with back and cervical strain at the emergency room and received instructions to rest in bed with no lifting, standing or driving for

¹ By decision dated March 14, 2002, the Office denied appellant's claim on the grounds that the evidence was insufficient to establish fact of injury. The Office further determined that she was not entitled to continuation of pay. In a decision dated August 15, 2002, the Office vacated the March 14, 2002 decision and accepted the claim for lumbosacral strain with left radiculopathy. The Office affirmed the finding that appellant was not entitled to continuation of pay.

² By letter dated October 1, 2003, the Office referred appellant for a second opinion examination with Dr. Bunsri T. Sophon, a Board-certified orthopedic surgeon. In a report dated October 22, 2003, Dr. Sophon diagnosed lumbosacral strain and status post L5-S1 laminectomy. He found that she had continuing limitations due to her employment injury. Dr. Sophon opined that appellant could resume work with restrictions on lifting, pushing or pulling over 20 pounds and sitting, walking and reaching more than 6 hours. He further determined that she could not twist, bend or stoop.

³ The record indicates that appellant underwent a lumbar laminectomy prior to her October 13, 2001 employment injury.

four days. She noted that she had an appointment scheduled with Dr. Wassef for August 24, 2004. Appellant submitted an undated report from the emergency room containing a diagnosis of back and cervical strain and indicating that she should remain off work from August 9 to 11, 2004.

In a letter dated August 23, 2004, the Office notified appellant that her reasons for refusing the position were unacceptable and provided her 15 days to accept the position or have her compensation terminated. The Office informed her that the medical evidence from the emergency room was insufficient to show that she could not perform the offered position.

By decision dated September 10, 2004, the Office terminated appellant's compensation effective that date on the grounds that she refused an offer of suitable work. The Office verified that the position remained available prior to terminating her compensation.

In a report dated August 24, 2004, received by the Office on September 14, 2004, Dr. Wassef noted that appellant related that on August 9, 2004 she "was walking down the stairs at home when her left leg gave out and she fell, severely aggravating her lower back." On physical examination, he noted that appellant experienced a great deal of pain and ambulated with a cane. Dr. Wassef diagnosed status post lumbar laminectomy at L5-S1, status post annuloplasty at L4-5, degenerative disc disease at L3-4, L4-5 and L5-S1, left radiculopathy and an aggravation of her lumbar spine due to her recent fall. He recommended diagnostic studies and advised her to "severely limit her activities within comfort." Dr. Wassef stated: "Temporary total disability from usual and customary work duties is extended for six weeks from the date of this evaluation."

On October 18, 2004 appellant requested reconsideration of her claim.

By decision dated November 5, 2004, the Office denied modification of its September 10, 2004 decision. The Office noted that, in his August 24, 2004 report, Dr. Wassef failed to address whether appellant could perform her modified job duties.

A computerized tomography (CT) scan post myelogram obtained on November 2, 2004 revealed "retrolisthesis of L3 over L4 with disc herniation. There is also disc disease at the level of L4-5 and L5-S1." The CT scan showed broad based disc herniations at L3-4, L4-5 and L5-S1.

In a report dated November 9, 2004, Dr. Wassef noted that the results of the CT scan were currently unavailable. He stated:

"[Appellant] was previously declared permanent and stationary on July 13, 2004. At that time, it was stated that she was a qualified injured worker and would not be able to resume her preinjury occupation as a result of the permanent orthopedic residuals to the lumbar spine. Subsequent to that visit, her left leg gave out while she was walking downstairs at home on August 9, 2004 and she has aggravated her lower back. She was placed on temporary total disability as of the date she was reexamined on August 24, 2004 through her present examination on November 9, 2004...."

In a report dated November 5, 2004, Dr. A. Michael Moheimani, a Board-certified orthopedic surgeon, discussed appellant's history of an October 13, 2001 employment injury and a prior injury in June 1986, which necessitated an L5-S1 laminectomy. He diagnosed degenerative disc disease at L3-4 with retrolisthesis at L3-4. Dr. Moheimani recommended a possible fusion depending on the results of a discography.

In a report dated November 12, 2004, a physician diagnosed a herniated disc and found that appellant was unable to work.⁴

In a progress report dated December 7, 2004, Dr. Wassef noted that a discogram showed a disc herniation and retrolisthesis of L3 over L4.⁵ He listed findings on physical examination of very limited range of motion "with pain and spasm." Dr. Wassef stated: "[Appellant] has been temporarily totally disabled as of August 9, 2004, the date of her fall and being temporarily totally disabled means that she was and remains unable to perform any and all work activities."

In a follow-up report dated December 10, 2004, Dr. Moheimani noted that the discography was "positive at [the] L3-4 and L5-S1 levels with evidence of disc degeneration and pain production." He diagnosed degenerative disc disease at L3-4 and L5-S1.

On December 15, 2004 appellant requested reconsideration. By decision dated January 6, 2005, the Office denied modification of its termination of her compensation.

In a report dated January 5, 2005, Dr. Moheimani noted that appellant continued to "have significant and disabling lower back pain." He requested authorization for an anterior discectomy and fusion at L3-4 and L5-S1.

In a report dated January 18, 2005, Dr. Wassef diagnosed lumbar pain due to a musculoligamentous strain and MRI scan evidence of a 5-6 millimeter (mm) disc herniation at L3-4, a 4 mm disc herniation at L4-5 and a 7 mm disc herniation at L5-S1. He stated:

"[Appellant] was to return to work on August 9, 2004 with restrictions. Unfortunately, she had a fall on August 8 and was not able to return to work. However, prior to her fall, she was still using a cane, was using a brace and using medications. As such, she was unable to drive and return to the type of work provided by the [employing establishment] at that time, which consisted of casing mail for two hours, delivering express mail by truck for two hours and sitting and stamping mail for two hours. It is my opinion that in the absence of her fall of August 8, 2004, she would be unable to perform these duties as described above."

In a progress report dated March 11, 2005, Dr. Wassef opined that appellant continued to be disabled from her usual employment.

By decision dated April 19, 2005, the Office denied modification of its termination of appellant's compensation based on her refusal of suitable work.

⁴ The name of the physician is not legible.

⁵ Appellant underwent a discography on November 16, 2004, which revealed abnormal discs at L3-4 and L5-S1.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁶ In this case, the Office terminated appellant's compensation under section 8106(c)(2) of the Federal Employees' Compensation Act,⁷ 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.⁸ 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.⁹ 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.¹⁰

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.¹¹ 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.¹²

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 employee's ability to work, establishing that a position has been offered within the employee's work restrictions and setting for the specific job requirements of the position.¹³ 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.¹⁴

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.¹⁵ 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.¹⁶ Office

⁶ *Linda D. Guerrero*, 54 ECAB 556 (2003).

⁷ 5 U.S.C. §§ 8101-8193.

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

⁹ *Ronald M. Jones*, 52 ECAB 190 (2000).

¹⁰ *Joan F. Burke*, 54 ECAB 406 (2003).

¹¹ 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 9.

¹² 20 C.F.R. § 10.516.

¹³ *See Linda Hilton*, 52 ECAB 476 (2001).

¹⁴ *Id.*

¹⁵ 20 C.F.R. § 10.517(a).

¹⁶ *Gayle Harris*, 52 ECAB 319 (2001).

procedures state that acceptable reasons for refusing an offered position include medical evidence of inability to do the work.¹⁷

ANALYSIS

The Board finds that the Office failed to meet its burden of proving that the August 9, 2004 modified-duty job was suitable as it did not properly consider appellant's contention that she was unable to perform the duties of the position due to an aggravation of her back condition caused by a fall on August 9, 2004.

The Office accepted that appellant sustained lumbosacral sprain with left radiculopathy due to an October 13, 2001 employment injury. The Office terminated her compensation effective September 10, 2004 on the grounds that she refused an August 9, 2004 offer of suitable work by the employing establishment. The Office determined that the position was suitable as it was within the restrictions of Dr. Wassef, her attending physician. The Office advised appellant that it had found that the position was suitable by letter dated August 9, 2004 and provided her 30 days to accept the position or provide reasons for her refusal. Appellant refused the position on August 17, 2004, asserting that she was unable to work due to an injury to her lower back and left leg. She submitted an emergency room report finding that she was unable to work from August 9 to 11, 2004. On August 23, 2004 the Office notified her that her reasons for refusing the position were not acceptable and allowed her an additional 15 days to accept the position. The Office terminated her benefits on September 10, 2004.

Once the employing establishment offered suitable work to appellant, it became incumbent upon her to provide medical evidence substantiating that she was unable to report to work during the period of time between the job offer and the date that the Office terminated benefits.¹⁸ On September 14, 2004 appellant submitted a report dated August 24, 2004 from Dr. Wassef, who discussed appellant's history of an injury to her lower back on August 9, 2004 when she fell while walking down the stairs. He listed findings on examination and found that her fall aggravated her lumbar spine condition. Dr. Wassef instructed appellant to "severely limit her activities" and opined that she was temporarily totally disabled from her usual work duties.

In a report dated November 9, 2004, Dr. Wassef found that appellant sustained an aggravation to her lower back on August 9, 2004. He opined that she was temporarily totally disabled as of the date of his examination on August 24, 2004 to the present. In a progress report dated December 7, 2004, Dr. Wassef interpreted a discogram as revealing a disc herniation and retrolisthesis of L3 over L4. He listed findings on physical examination of very limited range of motion "with pain and spasm" and determined that she was "unable to perform any and all work activities" beginning August 9, 2004.

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(3) (July 1997).

¹⁸ See *Shirley B. Livingston*, 42 ECAB 855 (1991).

In a report dated January 18, 2005, Dr. Wassef found that appellant had MRI scan evidence of disc herniations at L3-4, L4-5 and L5-S1 with bilateral radiculopathy. He noted that she was released to resume work with restrictions on August 9, 2004, but could not return due to a fall on August 9, 2004. Dr. Wassef opined that before her fall appellant required a cane, brace and medications and could not either drive or return to the offered employment at the employing establishment.

The record contains probative medical evidence that appellant sustained an aggravation of her back condition on August 9, 2004 such that she was unable to work prior to the Office's termination of her compensation. Her attending physician, Dr. Wassef, opined that she was totally disabled from employment as of the date of her fall on August 9, 2004 until after the date of the Office's termination of her compensation on September 10, 2004. It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of the suitability of an offered position.¹⁹ Additionally, proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.²⁰ In this case, the Office should have developed the evidence presented to determine whether appellant's injury on August 9, 2004 prevented her from performing the duties of the modified position prior to September 10, 2004, the date it terminated her compensation. Consequently, the Office failed to meet its burden of proof to establish that the modified position was suitable.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits effective September 10, 2004 for refusing an offer of suitable work.

¹⁹ See *Richard P. Cortes*, 56 ECAB ____ (Docket No. 04-1561, issued December 21, 2004).

²⁰ *Phillip L. Barnes*, 55 ECAB ____ (Docket No. 02-1441, issued March 31, 2004).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 19 and January 6, 2005 and November 5 and September 10, 2004 are reversed.

Issued: May 18, 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