United States Department of Labor
Employees' Compensation Appeals Board

T.B., Appellant	)	
and	)	**Docket No. 06-1431**
	)	**Issued: November 15, 2006**
U.S. POSTAL SERVICE, JAMES A. FARLEY STATION, New York, NY, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 8, 2006 appellant filed an appeal from a decision of the Office of Workers' Compensation Programs dated March 16, 2006, which terminated her wage-loss compensation on the grounds that she refused an offer of suitable work, and an April 26, 2006 decision which denied her request to change physicians. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's wage-loss compensation on March 16, 2006 pursuant to 5 U.S.C. § 8106(a); and (2) whether the Office properly denied appellant's request to change physicians.

FACTUAL HISTORY

On May 14, 2003 appellant, then a 41-year-old letter carrier working modified duty, filed a traumatic injury claim, alleging that on May 12, 2003 she sustained pain in the left arm and

swelling in the left wrist while sorting mail.[1] She stopped work that day. In an attached statement, she further described her injury as a sudden sharp pain in the left elbow going into her shoulder. On July 3, 2003 the Office accepted that appellant sustained acute left shoulder bicipital tendinitis and she was placed on the periodic rolls.

In early 2004, appellant relocated to Atlanta, Georgia. She came under the care of Dr. Reuben Sloan, a Board-certified physiatrist. In an August 12, 2004 report, Dr. Sloan noted that appellant had injured her back at work in 2000 and her left shoulder in May 2003. He reported a past medical history including diabetes mellitus and findings on examination of the left shoulder and low back. Dr. Sloan's impression was diffuse pain in multiple areas, suspicious for a diffuse myositis or fibromyalgia-type presentation and left shoulder impingement. He advised that a magnetic resonance imaging (MRI) scan demonstrated a presumed radial tear at L5-S1 which would not explain her lower extremity symptoms, a disc bulge at L4-5 and presumed compression of the thecal sac at C5-6. Dr. Sloan opined that appellant was capable of working a sedentary job with minimal lifting of no more than 10 pounds. He noted that, after initially recommending Medrol Dosepak he was not going to place her on the medication "as she was very concerned about her diabetes and states that when her blood sugars are elevated she feels lousy," and placed her on Bextra instead.

By letter dated September 21, 2004, the Office referred appellant, together with a statement of accepted facts, a set of questions, a job description for city carrier, and the medical record to Dr. Joseph Hoffman, Jr., Board-certified in orthopedic surgery, for a second opinion evaluation regarding her left shoulder condition.[2]

An MRI scan of the cervical spine on October 26, 2004 demonstrated multilevel degenerative disc disease with spondylosis and mild cord impingement from a disc herniation at C3-4. An MRI scan of the left shoulder that day demonstrated rotator cuff tendinopathy without tear, mild subacromial/subdeltoid bursitis and acromioclavicular (AC) joint arthrosis. In a November 29, 2004 report, Dr. Hoffman noted the history of the left upper extremity injury in May 2003 and his review of the diagnostic tests. Physical examination of the left shoulder demonstrated a marked positive impingement sign with full and painful range of motion and anterior tenderness. Dr. Hoffman diagnosed impingement syndrome of the left shoulder and cervical spine degenerative disc disease. He opined that these diagnoses were traumatic exacerbations of preexisting conditions and were caused by the May 12, 2003 employment injury. He advised that appellant could not perform her regular carrier duties or any job that required repetitive motions of the left upper extremity until she received an adequate course of conservative or surgical therapy. In an attached work capacity evaluation, Dr. Hoffman advised that appellant could initially work four hours a day with restrictions to her physical activity, increasing her hours after appropriate treatment.

[1] The record indicates that appellant had been working limited duty since January 2001 due to an employment-related back injury, adjudicated by the Office under file number 020774097. The instant claim was adjudicated under file number 022039272.

[2] On October 19, 2004 the employing establishment offered appellant a modified letter carrier position.

By letter dated December 10, 2004, the Office advised appellant that the modified letter carrier position offered was suitable. Appellant was notified of the penalty provisions of section 8106 of the Federal Employees' Compensation Act[3] and given 30 days to respond. On December 15, 2004 the Office additionally accepted that appellant sustained an employment-related left shoulder impingement syndrome. In a January 4, 2005 letter, appellant declined the job offer. She informed the Office that when she sustained the left upper extremity injury in May 2003, she was working limited duty for a previous employment-related injury she had sustained and provided a modified carrier position description that she had accepted on July 12, 2001. This contained restrictions that she not lift, push or pull over 10 pounds with no overhead reaching and a chair with a back was to be provided.

The Office determined that a conflict in medical opinion arose regarding appellant's work restrictions. On February 21, 2005 it referred her and the medical record to Dr. Keith Lamberson, a Board-certified orthopedic surgeon, for an impartial evaluation. Dr. Lamberson was provided an amended statement of accepted facts which noted accepted conditions of acute bicipital tendinitis and left shoulder impingement syndrome and a set of questions which asked that he evaluate appellant regarding the work-related conditions to determine if she had residuals and if she could perform her duties as a letter carrier.

In a February 21, 2005 report, Dr. Lamberson noted that he was evaluating appellant for left shoulder and neck pain. He provided a history of the May 12, 2003 left upper extremity injury and diabetes and noted appellant's continued complaints of radiating left upper extremity pain. Findings on examination of the left shoulder included a positive impingement sign and severe pain inhibition. Dr. Lamberson diagnosed cervical degenerative disc disease, left AC joint arthrosis and chronic left rotator cuff tendinopathy. He opined that her left shoulder condition was permanent and recommended arthroscopy, subacromial decompression and distal clavical resection. Dr. Lamberson advised that she had some cervical pathology and provided restrictions of no lifting greater than five pounds with her left upper extremity, no repetitive pushing and pulling and no overhead reaching.

Appellant notified the Office that she had returned to seasonal work with the Internal Revenue Service (IRS) on March 21, 2005 and was transferred to the IRS by the employing establishment. On April 13, 2005 the employing establishment offered appellant a modified carrier position for eight hours a day. The position was described as casing mail without reaching overhead and delivering mail including accountables within limitations. Lifting with the left arm was restricted to five pounds.

In decisions dated May 6 and 10, 2005, the Office informed appellant that her continuing compensation would be based on her actual earnings. By letter dated May 23, 2005, the Office informed appellant that the April 13, 2005 position offer was suitable. She was notified of the penalty provisions of section 8106 of the Act and given 30 days to respond. In a June 27, 2005 letter, the Office advised appellant that her reasons for refusing the offered position were not acceptable and she was given an additional 15 days to respond. Appellant submitted reports dated June 21, 2005 in which Dr. Sloan noted her complaints of left arm, neck and back pain.

[3] 5 U.S.C. §§ 8101-8193.

He stated that a July 10, 2004 MRI scan of the lumbar spine demonstrated a central protrusion at L5-S1. Dr. Sloan's impression was low back pain with occasional radiation in the left lower extremity secondary to the disc protrusion causing S1 radiculopathy and left upper extremity symptoms of unclear etiology. He opined that appellant could work at a sedentary level.

By decision dated July 14, 2005, the Office terminated appellant's wage-loss compensation on the grounds that she refused an offer of suitable work. Appellant's seasonal employment with the IRS ended on July 14, 2005. On September 14, 2005 she requested reconsideration, stating that she required shoulder surgery and reiterated that she was working restricted duty due to a back injury when she injured her left upper extremity in May 2003. She submitted reports dated August 23, 2005 in which Dr. Sloan reiterated his diagnoses and advised that appellant should be permanently restricted from working above shoulder height on the left.

By decision dated October 4, 2005, the Office vacated the July 14, 2005 termination decision because the restrictions from appellant's back injury had not been included in determining the suitability of the offered position. Appellant was returned to the periodic rolls. The Office ascertained that the offered position was still available and by letter dated November 2, 2005 it informed appellant that the position offered on April 13, 2005 was suitable. On November 30, 2005 she declined the offered position. Appellant's two claims were doubled on November 22, 2005.[4]

By letter dated November 23, 2005, the employing establishment informed the Office that no jobs were available for appellant in the Atlanta area. The Office requested that the employing establishment provide a new job offer.[5] The Office also asked Dr. Sloan for an updated report. On December 7, 2005 and January 10, 2006, the employing establishment offered appellant the position initially offered on April 13, 2005 with the additional restrictions of no prolonged sitting and alternate sitting and standing.

On September 24, 2005 appellant began employment as a data entry associate at Wachovia Bank. By letter dated December 7, 2005, the Office adjusted her compensation based on part-time private employment. On December 27, 2005 the Office again informed appellant that the offered position was suitable. In a letter dated January 19, 2006, appellant refused the offered position, stating that she was limited to part-time work and needed additional treatment and therapy. Appellant submitted reports from Dr. Sloan dated January 19, 2006 who diagnosed left S1 radicular symptoms secondary to a known disc herniation limited her to part-time sedentary work. Dr. Sloan also noted that appellant felt that she could not work at all due to pain but recommended that she continue part-time sedentary work.

By letter dated January 23, 2006, the Office informed appellant that the offered position was suitable. Appellant was again notified of the penalty provisions of section 8106 of the Act and given 30 days to respond. On February 6, 2006 she requested that her treating physician be changed from Dr. Sloan to Dr. Duncan Wells, a Board-certified orthopedic surgeon. She stated

[4] *Supra* note 1.

[5] Appellant was also notified that relocation expenses would be authorized.

that Dr. Sloan had given her injections without informing her that these could affect her diabetic condition and that he would not listen to her fears and concerns. Appellant submitted a January 26, 2006 report in which Dr. Wells noted the history of back and left shoulder injuries and her complaints of radiating back pain and left upper extremity weakness. Dr. Wells noted moderate paraspinal tenderness of the lumbar spine and diagnosed lumbar pain with discogenic radiculopathy and left shoulder AC joint synovitis with mild subacromial bursitis. He recommended epidural injections and stated that appellant should have a job that allowed her to stand and sit as needed and perform stretching exercises throughout the day.

On February 27, 2006 the Office found that the offered position was still available, and advised appellant that her reasons for refusing it were not acceptable. She was given an additional 15 days to respond. On February 28, 2006 appellant left private employment and returned to the IRS. In a March 16, 2006 decision, the Office terminated appellant's wage-loss compensation on the grounds that she refused an offer of suitable work. By decision dated April 26, 2006, the Office denied appellant's request to change physicians, finding no evidence to indicate that the treatment she had received was anything other than proper and adequate.

LEGAL PRECEDENT -- ISSUE 1

Section 8106(c) of the 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."[6] It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[7] To justify such a termination, the Office must show that the work offered was suitable.[8] The implementing regulation provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.[9] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[10] In determining what constitutes "suitable work" for a particular disabled employee, the Office considers the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors.[11] Section 8106(c) will be narrowly construed as it serves as a penalty provision which may bar an employee's entitlement to compensation based

[6] 5 U.S.C. § 8106(c).

[7] *Joyce M. Doll*, 53 ECAB 790 (2002).

[8] *Id.*

[9] 20 C.F.R. § 10.517(a).

[10] *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[11] 20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB ____ (Docket No. 04-584, issued September 2, 2004).

on a refusal to accept a suitable offer of employment.[12] 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.[13]

ANALYSIS -- ISSUE 1

The Board finds that the Office did not meet its burden of proof to terminate appellant's wage-loss compensation on March 16, 2006. The Board notes that, while the cases for appellant's accepted back and shoulder conditions were doubled, the case record before the Board merely consists of the shoulder claim. When the Office determined that a conflict in medical evidence had been created regarding appellant's work restrictions and requested that Dr. Lamberson perform an impartial evaluation, the questions presented asked that he evaluate appellant regarding her work-related shoulder condition only. The statement of accepted facts provided to Dr. Lamberson did not contain any information regarding appellant's back injury. In his February 21, 2005 report, he advised that appellant needed shoulder surgery. While the restrictions provided by Dr. Lamberson are encompassed in the offered position, since he was not aware of appellant's accepted back condition, his report is insufficient to meet the Office's burden of proof to terminate her wage-loss compensation.[14]

Appellant's attending physician, Dr. Sloan, has restricted her to sedentary work only and in his report dated January 19, 2006, that most contemporaneous with the March 16, 2006 termination, also restricted her to part-time work. The offered position is for eight hours a day and also contains a component for delivering mail, not a sedentary position.[15] 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.[16] The medical evidence in this case does not sufficiently establish that appellant can perform the offered position based on her accepted back and shoulder injuries.[17] The Office therefore failed to meet its burden of proof to terminate her wage-loss compensation on March 16, 2006.

LEGAL PRECEDENT -- ISSUE 2

Pursuant to section 8103(a) the Act, an employee is permitted the initial selection of a physician.[18] Congress, however, did not restrict the Office's power to approve appropriate

[12] *Gloria G. Godfrey*, 52 ECAB 486 (2001).

[13] *Sandra K. Cummings*, 54 ECAB 493 (2003).

[14] *Gloria G. Godfrey*, *supra* note 12.

[15] The Board also notes that Dr. Hoffman, who performed a second opinion evaluation for the Office, advised that appellant should begin work at four hours per day and only increase hours after appropriate treatment.

[16] *Sandra K. Cummings*, *supra* note 13.

[17] *Id.*

[18] 5 U.S.C. § 8103(a).

medical care after the initial choice of a physician. The Office has the general objective of ensuring that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time. The Office, therefore, has broad administrative discretion in choosing the means to achieve this goal within the limitation of allowing an employee the initial choice of a doctor.[19] Office regulations provide that an employee who wishes to change physicians must submit a written request to the Office fully explaining the reasons for the request. The Office may approve the request if sufficient justification is shown.[20]

Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts.[21]

ANALYSIS -- ISSUE 2

The Board finds that the Office did not abuse its discretion in denying appellant's request to change physicians. Contrary to appellant's assertion that Dr. Sloan did not discuss the interaction of medications with her, his August 12, 2004 report clearly noted her history of diabetes mellitus and reflected a discussion with her about this condition and her medications. Appellant failed to provide medical evidence that Dr. Sloan's diagnosis or treatment was inadequate. In its August 26, 2006 decision, the Office explained its reasons for not approving the change in physicians, advising that she was under the care of a qualified specialist and her treatment had been appropriate. Appellant has failed to establish that the Office abused its discretion by refusing to authorize a change of physicians on the basis of inadequate or improper care. Based on the evidence of record, the Office acted reasonably in determining that a change of physicians was not necessary to treat appellant's accepted conditions.[22]

CONCLUSION

The Board finds that the Office erred in terminating appellant's compensation but properly exercised its discretion in declining to authorize a change in treating physicians.

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

[20] 20 C.F.R. § 10.316.

[21] *Belinda R. Darville*, 54 ECAB 656 (2003).

[22] *See C.N.*, 57 ECAB ____ (Docket No. 06-1245, issued September 12, 2006).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 26, 2006 be affirmed. The decision dated March 16, 2006 is reversed.

Issued: November 15, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board