United States Department of Labor
Employees' Compensation Appeals Board

C.T., Appellant	)	
	)	
and	)	**Docket No. 07-173**
	)	**Issued: August 7, 2007**
DEPARTMENT OF THE TREASURY,	)	
INTERNAL REVENUE SERVICE,	)	
Richmond, VA, Employer	)	
	)	

Appearances:
Jeffrey P. Zeelander, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 24, 2006 appellant timely appealed a May 1, 2006 merit decision of the Office of Workers' Compensation Programs which terminated her wage-loss benefits for her refusal of suitable work. The record also contains a June 22, 2006 nonmerit decision in which the Office denied her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim and the nonmerit issue.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation, effective May 14, 2006, pursuant to 5 U.S.C. § 8106(c)(2) on the grounds that she refused an offer of suitable work; and (2) whether the Office properly denied appellant's request for reconsideration of the merits of her claim.

FACTUAL HISTORY

On July 2, 2001 appellant, then a 54-year-old tax examiner clerk, filed a traumatic injury claim alleging that exposure to toxic fumes on June 19, 2001 and suffered an asthma attack. The Office accepted her claim for bronchospasm. Appellant stopped work on June 20, 2001. She briefly returned to work on October 15, 2001 but stopped shortly thereafter. The Office eventually placed appellant on the periodic compensation rolls. Appellant filed for disability retirement in October 2006.

In a June 28, 2004 work capacity evaluation, Dr. Karen E. Bowles, a Board-certified internist and appellant's treating physician, indicated that appellant had intermittent shortness of breath due to asthma. She stated that appellant had neck, ankle and knee pain due to psoriasis and that she had degenerative joint disease as well as severe depression. Dr. Bowles opined that appellant would be unable to walk or sit at a desk for prolonged periods due to her conditions.

To clarify the extent of appellant's disability, the Office referred appellant to Dr. David L. Forde, a Board-certified internist specializing in pulmonary diseases. In a July 6, 2004 report, Dr. Forde noted the history of injury and appellant's medical history, which included psoriasis with arthritis, depression, hypertension, asthma and lumbosacral neuritis. He presented his examination findings and diagnosed severe, persistent asthma, possible gastroesophageal reflux disease and sinusitis. Dr. Forde stated that the work injury could either be the direct cause or an aggravating or precipitating factor of appellant's pulmonary and airway symptomology. This was dependent upon whether the work injury was the initial event or if appellant had a preexisting airway problem. Dr. Forde opined that appellant had continued residuals of the work injury and advised that she was unable to walk more than one block due to her work-related disability. In his July 6, 2004 work capacity evaluation report, he advised that appellant could work full time with limitations on walking, pushing, pulling, lifting, squatting, kneeling and climbing. Dr. Forde additionally stated that appellant needed to be in an environment free of fumes, dust and gases. He noted that appellant lived a distance from the work site and that she stated she had a two-hour transportation time and could not walk more than one block without requiring medication. In a July 8, 2004 addendum, Dr. Forde reviewed two sets of pulmonary function studies which he indicated did not support the presence of airway obstruction, such as would be seen with asthma, unless it was in remission. He also noted that the medical records contained multiple references to appellant being depressed. Dr. Forde concluded, based on his subsequent review of the record, that appellant has ongoing airway disease with compatible signs and symptoms which have been present since her fume exposure and were exacerbated at that time. He advised that the exact nature and causality of her ongoing airway disease was not definitely documented by the record. Dr. Forde further stated that appellant's subjective state was magnified by her psychiatric problems. In a September 7, 2004 report, he advised the current pulmonary function study did not differ significantly from those he previously reviewed. Dr. Forde stated that his opinion was unchanged.

By letter dated January 24, 2005, the Office determined that there was a conflict in medical opinion regarding appellant's level of impairment. The Office referred appellant to Dr. James H. Dovnarsky, a Board-certified internist specializing in pulmonary diseases, for resolution of the conflict.

In an August 31, 2005 report, Dr. Dovnarsky reviewed the medical evidence, noted the history of injury and treatment and listed examination findings. He noted an impression of reactive laryngospasms, precipitated by irritants, fumes and probably by exercise. Dr. Dovnarsky provided additional impressions of psoriasis and psoriatic arthritis, depression and hypertension. He stated that, while there was an element of reactive airways disease (asthma) by history, he believed the dominant disease was laryngospasms, which were currently present and may have been the dominant disease throughout the course of her illness. Dr. Dovnarsky stated that appellant's symptoms dated from her June 19, 2001 toxic fume inhalation that caused laryngospasm and bronchospasm. He noted that appellant was a lifelong smoker, but stated that he was unable to perform a spirometry because of severe bronchospasm. Dr. Dovnarsky opined that appellant's medical condition had improved so that she could return to work. He advised that she was able to walk and was limited more by arthritis in her knees and ankles than by dyspnea. Dr. Dovnarsky advised that appellant still had some reactive laryngeal disease and should avoid environments where she would be exposed to fumes or a high concentration of particulate matter. He stated that appellant should work indoors in a job that did not require her to repetitively go up and down stairs. In an August 31, 2005 work capacity evaluation, Dr. Dovnarsky advised that appellant was able to work full time with limitations on walking and climbing. He further advised that she needed to be in an environment free of fumes, odors and airborne particles.

On September 19, 2005 the Office referred appellant for rehabilitation services. An initial vocational assessment took place November 9, 2005 with the stated goal of placing appellant with her previous employer. The vocational rehabilitation counselor noted that appellant did not drive, never held a driver's license and lived within two blocks of public transportation. Appellant stated that she took two buses and "the El" to go to work. The vocational rehabilitation counselor noted that appellant stated that she was done with working as she was "sickly" and was interested in disability retirement, which she had applied.

On February 14, 2006 the employing establishment offered appellant a position as a remittance perfection clerk effective March 6, 2006. The position required appellant to input data into a computer terminal while sitting in a chair. The computer terminal would be at eye level when she was in a sitting position and required no reaching or working above shoulder level. Appellant would occasionally be required to move and carry computer listings, which would not exceed five pounds, for short distances. She would be required to walk short distances intermittently, not to exceed a total of one hour per day, with no stair climbing involved. Appellant would work indoors and would not be exposed to cold or dampness. She would be allowed to sit or stand at her convenience and comfort and could take frequent walks. Appellant declined the position on February 18, 2006. She stated that her health was bad and that she could not walk far without shortness of breath. Appellant advised that her joints were swollen from psoriasis arthritis, her asthma caused chest tightness every time the weather changed and the pain patches she wore caused her to be sleepy.

In a March 8, 2006 letter, the Office advised appellant that the offered position was suitable and the employing establishment confirmed that the position remained available to her. It advised appellant that section 8106(c) of the Federal Employees' Compensation Act[1] provided

[1] 5 U.S.C. §§ 8101-8193.

that an employee who refused an offer of suitable work was not entitled to further compensation. The Office afforded her 30 days to accept the offer or provide reasons for her refusal.

Appellant, in a March 16, 2006 letter, responded that her condition had not changed and she was still under her doctor's care. She stated that Dr. Dovnarsky's medical limitations were limited to her asthma condition. Appellant advised that she had other complications related to her work injury and also had severe depression and preexisting psoriasis and arthritis.

In a letter dated March 31, 2006, the Office informed appellant that her reasons for refusing the position were unacceptable. The Office allotted her 15 days to accept the position or have her compensation terminated.

Appellant did not accept the position. She submitted medical reports from Dr. Bowles dated August 28, November 21 and December 12, 2005 and January 13 and March 20, 2006 that listed her medical conditions and her current medications.

By decision dated May 1, 2006, the Office terminated appellant's compensation effective May 14, 2006 for refusing an offer of suitable work.

On May 26, 2006 appellant requested reconsideration. She explained that she was unable to return to work as her health had deteriorated since her June 19, 2001 work injury which required her to take numerous medications daily. Appellant listed her medications and stated that they caused side effects that affected other medical conditions. A May 22, 2006 medical report from Dr. Bowles listed appellant's medical conditions and current medications.

In a June 22, 2006 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was irrelevant and cumulative.

On appeal, appellant's attorney argues that the medical evidence fails to support that appellant could perform the offered position with her preexisting and subsequently acquired conditions. He further argues that no consideration was given to appellant's ability to ambulate or avoid exposure to fumes, odors and airborne particles given her commute on public transportation to and at the work site.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. In this case, the Office terminated appellant's compensation under section 8106(c)(2) of the Act, 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.[2] 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.[3] Section 8106(c) will be

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

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

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.[4]

Office regulations provide that, in determining what constitutes suitable work for a particular disabled employee, the Office should consider 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.[5] It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.[6] 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.[7]

In assessing medical evidence, the number of physicians supporting one position or another is not controlling, the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[8] Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer, medical evidence of inability to do the work or travel to the job or the claimant found other work which fairly and reasonably represents his or her earning capacity (in which case compensation would be adjusted or terminated based on actual earnings). Furthermore, if medical reports document a condition which has arisen since the compensable injury and the condition disables the employee, the job will be considered unsuitable.[9]

Section 10.516 of the Office's 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.[10] Thus, before terminating compensation, the Office must review the employee's proffered reasons for refusing or neglecting to work.[11] If the employee presents such reasons and the Office finds them

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

[5] 20 C.F.R. § 10.500(b).

[6] *Richard P. Cortes*, 56 ECAB ___ (Docket No. 04-1561, issued December 21, 2004).

[7] *Id.; Bryant F. Blackmon*, 56 ECAB ___ (Docket No. 04-564, issued September 23, 2005).

[8] *See Connie Johns*, 44 ECAB 560 (1993).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (July 1997).

[10] 20 C.F.R. § 10.516.

[11] *See Sandra K. Cummings*, 54 ECAB 493 (2003); *see also Maggie L. Moore*, 42 ECAB 484 (1991), *reaffd on recon.*, 43 ECAB 818 (1992) and 20 C.F.R. § 10.516 which codifies the procedures set forth in *Moore*.

unreasonable, the Office will offer the employee an additional 15 days to accept the job without penalty.[12]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained bronchospasms as a result of an exposure to toxic fumes on June 19, 2001. The Office terminated her monetary compensation effective May 14, 2006 based on her refusal of suitable work. The Board finds that the Office established that the offered position of remittance perfection clerk was suitable.

The Office found that a conflict of medical opinion regarding appellant's level of impairment existed between Dr. Bowles, who found that appellant would be unable to walk or sit at a desk for prolonged periods, and Dr. Forde, the Office referral physician, who found that she could perform work full time within restrictions.[13] The Office properly referred appellant to Dr. Dovnarsky to resolve the conflict. When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[14]

In an August 31, 2005 report, Dr. Dovnarsky reviewed appellant's history of injury, provided findings on examination and related his clinical findings. He provided impressions of reactive laryngospasms, psoriasis and psoriatic arthritis, depression and hypertension. Dr. Dovnarsky indicated that appellant's symptoms dated to her June 19, 2001 inhalation of toxic fumes. He opined, however, that appellant's medical condition had improved to the point where she could return to work full time. Dr. Dovnarsky stated that appellant's ability to walk was limited more by her arthritis in her knees and ankles than by dyspnea. He submitted an August 31, 2005 work capacity evaluation setting forth her work restrictions. Dr. Dovnarsky advised that appellant was generally limited in walking and climbing and could not work in an environment where she was exposed to fumes, odors or airborne particles.

The Board finds that, under the circumstances of this case, the opinion of Dr. Dovnarsky is sufficiently well rationalized and based upon a proper factual background. It is entitled to special weight and establishes that appellant could work a modified position subject to the restrictions the physician set forth. Dr. Dovnarsky reviewed the entire case record and statement of accepted facts and examined appellant. He determined that appellant could work within specified restrictions for eight hours daily. Dr. Dovnarsky's opinion is entitled to special weight and establishes that appellant had the physical capacity for limited-duty work.

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[12] *Id.*

[13] 5 U.S.C. § 8123(a), in pertinent part, provides: 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 a third physician who shall make an examination.

[14] *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

The record reflects that the physical restrictions of the modified position offered to appellant on February 14, 2006 conform to the restrictions provided by Dr. Dovnarsky. The job offer advised that appellant would work indoors and not be exposed to cold or dampness. It further advised that she would occasionally carry computer listings of no more than five pounds short distances on an intermittent basis, not to exceed one hour per day, with no stair climbing involved. The Board finds that the physical requirements of the offered position are consistent with the work restrictions set forth by Dr. Dovnarsky and that the offered position is medically suitable to appellant's work restrictions.

The Office notified appellant of its finding that the remittance perfection clerk position was suitable and of the consequences for not accepting a suitable offer. The Office additionally confirmed that the position remained available and allowed her 30 days in which to accept the position. Appellant declined the offer and asserted that she could not work due to her various medical conditions (work related, preexisting, and subsequently acquired). She submitted no medical evidence which found her to be totally disabled from her various medical conditions. In accord with established procedures, the Office provided appellant an additional 15 days to accept the position prior to termination of compensation. Appellant submitted reports from Dr. Bowles, which noted her various medical conditions and provided a listing of her current medications. This evidence is insufficient to show that the offered position was not medically suitable. Dr. Bowles' treatment notes do not contain an opinion on disability or address the suitability of the offered position. A listing of medical conditions and current medications does not adequately explain how appellant's medical conditions prevented her return to work in the limited-duty position. The report of Dr. Bowles is not sufficient to establish that appellant could not perform the offered position. Additionally, the Board notes Dr. Bowles was on one side of the medical conflict.[15] The weight of the medical evidence establishes that, at the time the job offer was made, appellant was capable of performing the limited-duty position.

On appeal, appellant's counsel argues that there is no medical evidence supporting that appellant could perform such a position given her preexisting and subsequently acquired conditions. However, Dr. Dovnarsky was aware of and took appellant's various medical conditions into account in determining her limitations. Further, there is no medical evidence of record submitted after Dr. Dovnarsky's report that finds appellant to be totally disabled as a result of her preexisting or subsequently acquired conditions. Appellant's counsel argues no consideration was given to appellant's ability to ambulate sufficiently to achieve the commute required by the offered position or how she could avoid "any fumes, odors, and airborne" particles while riding public transportation to get to the job site or at the job site. The Board finds that Dr. Dovnarsky properly considered all of appellant's conditions in determining that she would work within restrictions. Furthermore, to the extent that appellant is asserting that a return to work might cause further injury, the Board has held that fear of future injury is not compensable.[16]

[15] A subsequently submitted report of a physician on one side of a resolved conflict of medical opinion is generally insufficient to overcome the weight of the impartial medical specialist or to create a new conflict of medical opinion. *Daniel F. O'Donnell, Jr.*, 54 ECAB 456 (2003).

[16] *See Helen E. Paglinawan*, 51 ECAB 591 (2000).

The Board finds that the job offered was medically and vocationally suitable, and the Office followed its procedures prior to termination of compensation. Accordingly, the Board finds that the Office met its burden of proof to terminate compensation for wage loss effective May 14, 2006.

LEGAL PRECEDENT -- ISSUE 2

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the claimant has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).[17] The application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[18]

Section 10.608(b) provides that, when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review of the merits.[19]

ANALYSIS -- ISSUE 2

Appellant's May 26, 2006 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, she did not advance a relevant legal argument not previously considered by the Office. Appellant merely argued that she was unable to work because of all her medical conditions and the effect of her daily medications. Consequently, she is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

Appellant submitted a May 22, 2006 report from Dr. Bowles which listed her current diagnoses and medications. Dr. Bowles' report is not relevant to the issue at hand, *i.e.*, whether appellant was capable of performing the limited-duty position at the time it was offered. She does not discuss the offered position or provide an opinion explaining how or why appellant's diagnosed conditions prevented her from performing the job duties of the selected position at the time her compensation was terminated. Further, Dr. Bowles' report is cumulative of other reports previously of record. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[20]

[17] 20 C.F.R. § 10.606(b)(1)-(2); *see Sharyn D. Bannick*, 54 ECAB 537 (2003). *See also* 5 U.S.C. § 8128.

[18] 20 C.F.R. § 10.608(b).

[19] *Id*.

[20] *Howard A. Williams*, 45 ECAB 853 (1994).

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2), and properly denied her May 26, 2006 request for reconsideration.

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's disability compensation under 5 U.S.C. § 8106(c)(2) for refusal of suitable employment. The Board further finds that the Office properly denied appellant's request for reconsideration without a review of the merits of her claim.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated June 22 and May 1, 2006 are affirmed.

Issued: August 7, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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