

letter carrier duties. In a decision dated January 3, 2002, the Office accepted appellant's claim for cervical herniated discs at C5-6 and C6-7. Appellant stopped work on July 23, 2001 and did not return.

A magnetic resonance imaging (MRI) scan of the cervical spine dated March 22, 2002, revealed a tiny disc bulge at C6-7. An MRI scan of the left shoulder dated April 16, 2002 revealed no abnormalities. Appellant sought treatment from Dr. Walter E. Afield, Board-certified in psychiatry and neurology. In reports dated May 10 to October 22, 2002, Dr. Afield noted a history of appellant's injury and diagnosed chronic pain due to bulging discs, questionable reflex sympathetic dystrophy and a depressive reaction. On May 10, 2002 he performed an in-depth behavioral assessment and diagnosed chronic pain due to bulging discs, questionable reflex sympathetic dystrophy, possible surgical recommendation and depressive reaction, severe and overwhelming. Dr. Afield indicated that appellant was injured at work and subsequently became exhausted and depressed. He advised that appellant needed intensive psychotherapy for her depression and a pain management program that addressed physical problems that she was experiencing. In a report dated May 29, 2002, Dr. Afield diagnosed severe depression and opined that appellant's depression was caused by her accepted cervical condition. He indicated that the chronic pain, reflex sympathetic dystrophy, possible surgery and profound depression were incapacitating appellant. Dr. Afield opined that appellant's diagnosed conditions were causally related to her work injury and that she was totally disabled.

On September 19, 2002 the Office referred appellant for a second opinion to Dr. Mohammed Y. Memon, a Board-certified neurosurgeon, to determine whether she had any residuals of her work-related cervical condition and her work capacity. In a report dated October 15, 2002, Dr. Memon indicated that he reviewed the records provided to him, noted appellant's history and provided findings on examination. He diagnosed subjective pain and numbness, objective findings of spasm and tenderness of the left trapezius and mild tenderness in the paraspinal area and cervical region. Dr. Memon advised that appellant was not a surgical candidate and recommended that she be detoxified completely before being evaluated for her pain. He advised that appellant was totally disabled.

Appellant submitted reports from Dr. Afield dated October 31, 2002 to January 24, 2003. Dr. Afield noted that appellant continued psychotherapy and was on Methadone for her pain. In reports dated January 15 to 24, 2003, he advised that appellant was overwhelmed with stress and overmedicating herself. Dr. Afield believed appellant was "doctor shopping" in an attempt to obtain additional medication. He recommended that appellant seek treatment for her substance abuse and advised that she was totally disabled.

In a letter dated November 26, 2002, the Office requested a supplemental report from Dr. Memon and authorized additional testing if necessary. In a report dated December 3, 2002, Dr. Memon advised that he found no objective neurological findings to support disability and determined that appellant's symptoms of pain and numbness were subjective. He opined that appellant could return to work and recommended a computer tomography myelogram.

Appellant submitted reports from Dr. Edward Sleight, a specialist in pain management, dated March 19 to July 10, 2003, who noted that appellant presented with neck, left shoulder and arm pain and migraine headaches and diagnosed cervalgia and neuropathy. Dr. Sleight advised that appellant's injuries caused her to be depressed.

On July 23, 2003 the Office found a conflict of medical opinion existed between Dr. Afield, appellant's treating physician, who indicated that appellant was disabled due to residuals of her work-related injury and Dr. Memon, an Office referral physician, who determined that appellant could return to work subject to restrictions. The Office referred appellant to Dr. Peter L. Mayer, a Board-certified neurosurgeon, selected as the impartial medical specialist.

In an October 20, 2003 report, Dr. Mayer noted appellant's history and reviewed the records provided to him. He noted that physical examination revealed limited range of motion of the neck, shoulder, marked tenderness to palpation of the cervical paraspinal musculature, musculature of the left shoulder and deltoid regions, tenderness to the shoulder motion in abduction and rotation, tenderness in the medial scapular area, acromioclavicular joint area, rotator cuff and bicipital tendon region. Dr. Mayer diagnosed chronic left C7 radiculopathy secondary to a small C6-7 herniated disc attributable to her work injury, pain syndrome out of proportion to the radiographic findings and the expected degree of pain that would be attributable to a small herniated disc and severe social and neuropsychological problems. He opined that only a small portion of disability could be attributable to the work injury. Dr. Mayer found that appellant had reached maximum medical improvement. Regarding appellant's ability to work, he indicated that appellant could work full time with restrictions on lifting over 20 pounds. Dr. Mayer prepared a work capacity evaluation of the same date, noted that she reached maximum medical improvement on October 20, 2003, stated that she could return to work full time and advised that her only limitation was a lifting restriction limited to an impairment of 25 pounds.

In reports dated October 29 to December 29, 2003, Dr. Sleight noted appellant's complaints of neck, arm and hand pain with numbness and diagnosed cervalgia and herniated nucleus pulposus at C6-7.

On December 11, 2003 the employing establishment offered appellant a full-time limited-duty position as a modified rural carrier associate effective December 20, 2003 with no lifting over 25 pounds.

On December 19, 2003 appellant rejected the job offer noting that she was scheduled for an MRI scan for her herniated disc and surgery on that day. An MRI scan of the cervical spine dated December 17, 2003 revealed findings suspicious for subacute annular tear at C6-7 with associated central focal disc protrusion.

By letter dated January 6, 2004, the Office requested clarification from Dr. Mayer with regard to the lifting restrictions set forth in his report of October 20, 2003. It indicated that Dr. Mayer's report noted that appellant was subject to a lifting restriction of 20 pounds for eight

hours per day and the work capacity evaluation of the same date noted a maximum lifting restriction of 25 pounds. On January 9, 2004 Dr. Mayer noted that appellant's lifting restriction was 25 pounds.

In a January 20, 2004 letter, the Office advised appellant that the modified job offer constituted suitable work. She was provided 30 days to accept the position or give reasons for refusing it; otherwise, she risked termination of her compensation benefits.

Appellant submitted a report from Dr. Sleight dated January 21, 2004. He noted that appellant presented with severe neck pain radiating under her shoulder blade and into the left hip and diagnosed herniated nucleus pulposus at C6-7. In a February 3, 2004 report, Dr. Antonio DiSclafani, a Board-certified neurologist, saw appellant for a surgical consultation. He noted that appellant sustained an on-the-job injury at the employing establishment involving an automobile on May 25, 2003 and had since experienced chronic neck, trapezius, left elbow pain and numbness radiating into her left forearm. Dr. DiSclafani noted that an MRI scan from December 17, 2003 revealed disc bulges at C4-5, C5-6 and C6-7 and a possible tear at C6-7. He diagnosed chronic mechanical neck pain and left rotator cuff pain and opined that appellant was not a surgical candidate.

On March 3, 2004 the Office advised appellant that the position of a modified distribution clerk was suitable work. It noted that it considered the reasons given by appellant for refusing the position and found them to be unacceptable. The Office afforded appellant 15 additional days to accept the job offer.

Appellant submitted a duplicative report from Dr. Afield dated May 10, 2002. He noted performing an in-depth neurobehavioral assessment who advised that the results were indicative of post-traumatic stress disorder.

In a decision dated March 30, 2004, the Office terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work.

By letter dated July 1, 2004, appellant requested an oral hearing before an Office hearing representative. The hearing was held on May 25, 2005. In reports dated December 16, 2003 to July 29, 2005, Dr. Sleight noted appellant's continued treatment for severe neck pain radiating under the left shoulder. On July 29, 2005 he diagnosed a herniated C6-7 disc and advised that appellant reached maximum medical improvement and was not a surgical candidate. He opined that she could lift three to four pounds on the left and five to six pounds on the right with poor prognosis for improvement. An MRI scan of the cervical spine dated October 5, 2004 revealed one small shallow central disc protrusion at C6-7. Also submitted was a report from Dr. Douglas M. Hershkowitz, a Board-certified neurosurgeon, dated October 14, 2004. He noted that appellant presented with neck, left upper arm and shoulder blade pain and numbness in the left arm. He opined that her pain was myofascial in origin. Appellant submitted a Social Security Administration decision dated February 23, 2005, which determined that she was totally disabled beginning July 17, 2001.

In a decision dated August 18, 2005, the hearing representative affirmed the March 30, 2004 decision.

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for her is not entitled to compensation.¹ The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. 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 and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.² 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 or neglected by appellant was suitable.³

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.⁴ To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of her refusal to accept such employment.⁵

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.⁶ 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.⁷ 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). If medical

¹ 5 U.S.C. § 8106(c)(2).

² *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

³ *Glen L. Sinclair*, 36 ECAB 664 (1985).

⁴ 20 C.F.R. § 10.517(a) (1999); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(5) (July 1997).

⁵ *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

⁶ *See Marilyn D. Polk*, 44 ECAB 673 (1993).

⁷ *See Connie Johns*, 44 ECAB 560 (1993).

reports document a condition which has arisen since the compensable injury and the condition disables the employee, the job will be considered unsuitable.⁸

ANALYSIS

The Office accepted that appellant sustained cervical herniated discs at C5-6 and C6-7. The Office terminated appellant's compensation effective March 30, 2004 based on appellant's refusal of suitable work.

The Board finds that the medical evidence does not establish that appellant was capable of performing the job requirements of the offered position. On December 11, 2003 the employing establishment offered appellant a full-time limited-duty position as a modified rural carrier associate effective December 20, 2003 with no lifting over 25 pounds. The impartial referee Dr. Mayer, diagnosed chronic left C7 radiculopathy secondary to a small C6-7 herniated disc attributable to her work injury, pain syndrome out of proportion to radiographic findings and severe social and neuropsychological problems. In an amended report dated January 9, 2004, he clarified that appellant could return to work full time with restrictions on lifting limited to 25 pounds. Although Dr. Mayer opined that only a small portion of appellant's disability was due to the work injury and advised that appellant had reached maximum medical improvement, the Office did not take into account the nonwork-related conditions of social and neuropsychological problems and depression in determining the suitability of the limited-duty job offer. Additionally, it does not appear that Dr. Afield, appellant's treating psychiatrist reviewed the job offer nor does the record indicate that the Office or the employing establishment took into consideration Dr. Afield's determination in reports dated May 10, 2002 to January 24, 2003, that appellant needed intensive psychotherapy for her depression and that her depression was caused by her accepted cervical condition. He further indicated that the chronic pain, reflex sympathetic dystrophy, possible need for surgery and profound depression were incapacitating appellant and that these diagnosed conditions were causally related to her work injury and that she was totally disabled.

There is no indication that the Office sought clarification of these matters, specifically with regard to appellant's psychiatric restrictions, prior to terminating compensation for a refusal of suitable work.⁹ Although appellant was able to return to work with restrictions from an orthopedic standpoint, her ability to return to work from a psychiatric standpoint was questioned by Dr. Afield. The medical evidence fails to establish that the job offered was suitable. The Office improperly terminated appellant's compensation on the grounds that she refused an offer of suitable work.¹⁰

⁸ *Id.* at Chapter 2.814.4(b)(4) (July 1997).

⁹ See *Maggie L. Moore*, *supra* note 5.

¹⁰ See *Patrick A. Santucci*, 40 ECAB 151 (1988).

The Federal (FECA) Procedure Manual provides:

“[I]f medical reports in the file document a condition which has arisen since the compensable injury and this condition disables the claimant from the offered job, the job will be considered unsuitable (even if the subsequently-acquired condition is not work related).”¹¹

Consequently, the Office erred where it did not consider appellant’s nonemployment-related emotional condition in determining the suitability of the modified job offer.

CONCLUSION

The Board finds that the Office did not meet the burden of proof in terminating appellant’s disability compensation for refusal of suitable employment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers’ Compensation Programs dated August 18, 2005 is reversed.

Issued: January 31, 2007
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

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b) (July 1997).