United States Department of Labor
Employees' Compensation Appeals Board

C.C., Appellant	)	
and	)	**Docket No. 06-1448**
	)	**Issued: March 6, 2007**
U.S. POSTAL SERVICE, POST OFFICE, East Hartford, CT, Employer	)	

Appearances:
Alan J. Shapiro, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 5, 2006 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated June 29, 2005 and March 24, 2006, which terminated her compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office properly terminated appellant's wage-loss compensation on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On July 18, 2000 appellant, then a 34-year-old letter carrier, filed a traumatic injury claim for a July 8, 2000 injury to her neck and back when her postal vehicle was rear-ended. The

Office accepted the claim for a cervical strain and paid appropriate compensation.[1] Appellant stopped work on July 19, 2000 and did not return.

Appellant sought treatment from Dr. Donald Dworken, a Board-certified orthopedic surgeon, who noted in reports dated July 25 to September 28, 2000 that appellant was injured on July 18, 2000 when she was rear-ended at work. A magnetic resonance imaging (MRI) scan of the lumbar spine dated October 9, 2000 revealed no abnormalities. An x-ray of the lumbar spine dated October 9, 2000 revealed no abnormalities. In treatment notes dated November 3, 2000 to August 27, 2003, Dr. Raymond E. Jankowich, a Board-certified orthopedic surgeon, noted a history of injury and diagnosed low back strain, herniated disc and disc syndrome. He advised that appellant was totally disabled. A November 6, 2003 treatment note from Dr. Michael J. Brennan, a Board-certified orthopedic surgeon, noted appellant's history, findings on examination and diagnosed chronic low back pain, heel spurs, depression and obesity. Dr. Brennan opined that appellant was disabled due to her work injury.

In October 2003, the Office referred appellant for a second opinion to Dr. MacEllis K. Glass, a Board-certified orthopedic surgeon, to determine whether appellant had residuals of her work injury. In a report dated October 16, 2003, Dr. Glass noted that he reviewed the history of injury and provided findings on examination. He diagnosed traumatic aggravation of chronic cervical syndrome. Dr. Glass indicated that he had serious reservations about the causality of appellant's subjective back pain syndrome. He indicated that imaging studies ruled out a structural spine injury and it was improbable that a soft tissue sprain would cause appellant's functional handicap three years after the injury. Dr. Glass advised that appellant was at maximum medical improvement and opined that her problem was not a musculoskeletal condition but morbid obesity. He recommended an electromyogram (EMG) and advised that appellant could return to a light-duty sedentary position with no heavy lifting. In a supplemental report dated November 25, 2003, Dr. Glass advised that appellant underwent an EMG on November 21, 2003 which revealed mild to moderate left C7 radiculopathy and posterior sensory wave changes at the cervical spine level. He advised that the EMG revealed no signs of peripheral nerve involvement and would not warrant any radical treatment.

In reports dated November 18, 2003 to May 19, 2004, Dr. Brennan diagnosed chronic low back pain consistent with herniated nucleus pulposus, heel spurs, myofascial pain syndrome and depression. He advised that appellant was totally disabled. Dr. Brennan also diagnosed myofascial pain syndrome and tendinitis of the right elbow and advised that appellant was totally disabled.

On November 23, 2004 the Office noted a conflict of medical opinion. Dr. Brennan, appellant's treating physician, indicated that she had residuals of her work-related cervical sprain and was totally disabled. Dr. Glass, an Office referral physician, determined that appellant did not have residuals of her accepted conditions and could return to work subject to restrictions.

[1] On December 23, 1996 appellant filed a traumatic injury claim for a neck injury occurring on December 13, 1996, file number 01-0343641. The Office accepted this claim for sprain and strain of the neck. On June 18, 1998 appellant filed a traumatic injury claim for a neck injury occurring on June 18, 1998, file number 01-0357553. The Office accepted appellant's claim for sprain/strain of the thoracic and sprain/strain of the neck.

The Office referred appellant to Dr. Peter T. Naiman, a Board-certified orthopedic surgeon, selected as the impartial medical specialist. In a report dated December 20, 2004, Dr. Naiman reviewed the records and provided findings on examination of appellant. He diagnosed aggravation of chronic cervical syndrome and a prior left C5-6 disc herniation. The physical examination revealed mild restriction in range of motion for the cervical and lumbosacral spine, no neurological or motor deficit of the lower extremities and mild sensory deficit in the left arm in the C6-7 distribution. Dr. Naiman noted that appellant's history was significant for a prior injury to the cervical spine in 1996 and which remained symptomatic. He indicated that the nature of appellant's symptoms dated to 1996 and that the injury of July 18, 2000 was an aggravation of her chronic cervical syndrome. Dr. Naiman opined that appellant reached maximum medical improvement and could return to work in a light-duty position. He submitted a December 20, 2004 work capacity evaluation that restricted appellant to sitting for four hours, walking for one hour, standing for one to two hours, reaching and reaching above the shoulder for two to four hours, twisting for two hours, pushing and pulling for two to four hours, lifting up to five pounds for one hour, no bending or stooping and no kneeling or climbing. Dr. Naiman advised that appellant could not operate a motor vehicle and was generally limited in repetitive movements of the wrists and elbows. He advised that appellant could work for four to six hours per day and that the restrictions would apply for one month.

On February 17, 2005 the employing establishment offered appellant a part-time limited-duty position as a rehabilitation letter carrier effective February 17, 2005 with a tour of duty from 8:00 a.m. to 12:00 p.m. for the first week, 8:00 a.m. to 1:00 p.m. for the second week, and 8:00 a.m. to 2:00 p.m. from the third week forward with an annual salary of $46,460.00. The offer noted that appellant would work up to six hours per day in conformance with Dr. Naiman's restrictions. The duties included casing letters, delivery of mail to cluster boxes, wall units, delivery of express mail/parcels, sorting mail, maintaining records, reviewing mail, recording and updating change of address cards, verifying delivery confirmation and answering telephones. The physical requirements of the position included sitting for four hours per day, walking for one hour per day, standing for one to two hours per day, reaching and reaching above the shoulder two to four hours per day, limited repetitive movement of the wrist and elbow, pushing and pulling two to four hours per day, lifting one pound to five pounds, no bending/stooping, kneeling or climbing. The job was subject to Dr. Naiman's limitations, including: sitting for four hours, walking for one hour, standing for one to two hours, reaching and reaching above the shoulder for two to four hours, twisting limited to two hours per day, no bending or stooping, pushing and pulling limited to two to four hours, lifting limited to one hour and five pounds and no kneeling or climbing.

In a March 3, 2005 letter, the Office advised appellant that the job offer constituted suitable work. Appellant was informed that she had 30 days to accept the position or provide reasons for refusing it; otherwise, she risked termination of her compensation benefits.

In letters dated March 17 and April 14, 2005, appellant, through her attorney, indicated that she would not accept the job offer until she had seen the referee physician's report. She noted that she could not obtain an additional report from her treating physician because he had broken his leg. Appellant submitted reports from Dr. Brennan dated January 31 to May 4, 2005. Dr. Brennan diagnosed chronic low back pain, heel spurs, myofascial pain syndrome,

degenerative disc disease of the cervical and lumbar spine and carpal tunnel syndrome. He advised that appellant remained totally disabled.

On June 1, 2005 the Office advised appellant that the position of a rehabilitation letter carrier was suitable work. The Office noted that it considered the reasons she provided for refusing the position and found them to be unacceptable. The Office afforded appellant 15 additional days to accept the job offer.

In a June 14, 2005 letter, appellant informed the Office that she would accept the job offer under protest. She requested that the employing establishment contact her and arrange a date for her to return to work. In a fax coversheet dated June 15, 2005, appellant advised that she was accepting the job offer under protest and requested the Office contact her to establish the terms of her return to work and to obtain a uniform allowance. She further indicated that she would need to make arrangements for suitable day care for her daughter. Appellant submitted a report from Dr. Brennan dated June 7, 2005. Dr. Brennan advised that there were no changes in appellant's status.

In a June 20, 2005 letter, the employing establishment noted receipt of appellant's acceptance of the job offer under protest. It granted appellant until June 25, 2005 to secure child care services and advised her to report to work on June 27, 2005 at 8:00 a.m. The employer noted that if appellant could not secure child care services she must inform her supervisor. If she failed to report as scheduled she would be charged as absent without leave. The employer further noted that appellant should have ample uniform supplies because she had not worked in five years and that uniform replenishment was based on seniority and would be renewed according to that date.

In a June 23, 2005 letter, appellant contended that she could not find suitable child care by June 25, 2005. She noted that the employing establishment was unreasonable in denying her request for a uniform allotment as she had been out of work for five years and the uniforms she had were no longer serviceable.

In a letter to the Office dated June 27, 2005, the employing establishment noted that appellant was scheduled to return to work on June 27, 2005 but did not report.

In a decision dated June 29, 2005, the Office terminated appellant's monetary compensation, effective July 10, 2005, on the grounds that she refused an offer of suitable work.

Appellant submitted a signed rehabilitation job offer dated July 5, 2005 "under protest." This was received by the Office on July 7, 2005. She indicated that she contacted the employing establishment on June 24, 2005 and advised that she was unable to secure child care services until July 1, 2005. Appellant indicated that the employer scheduled a meeting on July 5, 2005 to discuss her work restrictions. She intended to present a report from Dr. Brennan which set forth job restrictions differing from those in the job offer. Appellant stated that she was informed by her supervisor to report to work on July 2, 2005; however, on July 2, 2005 she received correspondence from the employer instructing her to attend a meeting on July 5, 2005. She indicated that she would sign the job offer if she was permitted to include an addendum noting that she accepted the position on June 14, 2005. Appellant submitted work restrictions from

Dr. Brennan which differed from those outlined in the job offer. The employing establishment refused to sign appellant's addendum and construed her actions as a rejection of the job offer. Appellant submitted a letter from a union representative dated June 24, 2005. It noted that she was the union steward at the Hillside/Newfield zones and would file a grievance if she was removed from this route. There was also a conflict between appellant's nonscheduled day off prior to her work injury and the nonscheduled day off in the job offer.

The employing establishment submitted a statement dated July 1, 2005 which requested that appellant report to the employing establishment on July 5, 2005 to discuss her transition back to work. In a letter dated July 6, 2005, the employer noted that a return to work meeting was held on July 5, 2005 and appellant refused the job offer and had not returned to work.

By letter dated July 6, 2005, appellant requested an oral hearing. The hearing was held on December 13, 2005. Appellant submitted reports from Dr. Brennan dated July 1 to November 22, 2005. Dr. Brennan repeated his diagnoses and advised that appellant remained totally disabled. In a duty status report dated July 5, 2005, he noted that appellant could return to work for four hours per day with restrictions on lifting for two hours per day up to five pounds, sitting for four hours per day, standing and walking for one hour per day, no climbing, kneeling, bending, stooping or twisting and reaching above the shoulder limited to two hours per day. In reports dated December 21, 2005 to March 16, 2006, Dr. Brennan noted appellant's intractable pain, worsening mood and anxiety which he attributed to her work injury. A letter from appellant's day care provider dated August 8, 2005 indicated that she was unable to provide day care until July 1, 2005. Appellant submitted statements dated January 6 and 31, 2006 summarizing her correspondence with her employer since June 27, 2005.

In an August 26, 2005 letter, the employing establishment noted that appellant was currently absent without leave. It offered her an opportunity to sign the limited-duty job offer and to return to work by August 30, 2005. In an undated letter received January 18, 2006, the employing establishment noted that appellant was offered an opportunity to either accept or reject the job offer and was advised that her attorney could also sign the job offer. Appellant did not sign the job offer.

In a decision dated March 24, 2006, the hearing representative affirmed the December 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 him is not entitled to compensation.[2] 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

[2] 5 U.S.C. § 8106(c)(2).

forth the specific job requirements of the position.[3] 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.[4]

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.[5] 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.[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 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]

ANALYSIS

The Office accepted that appellant sustained a cervical strain. The Office terminated appellant's compensation effective July 10, 2005 based on her refusal of a suitable work job offer. The Board finds that the Office established that the offered position of February 17, 2005 was suitable.

---

[3] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

[4] *Glen L. Sinclair*, 36 ECAB 664 (1985).

[5] 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).

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

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

[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).

The Office found that a conflict in medical opinion arose between appellant's attending physician, Dr. Brennan, a Board-certified orthopedic surgeon, and Dr. Glass, a Board-certified orthopedic surgeon, and Office referral physician, regarding whether appellant's accepted conditions had resolved and whether she was totally disabled from work.[10] The Office properly referred appellant to Dr. Naiman to resolve the conflict. Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.[11]

In a December 20, 2004 report, Dr. Naiman reviewed appellant's history of injury, provided findings on examination and related his clinical findings. He found some restriction of motion in the cervical and lumbosacral spine and mild sensory deficit in the left arm in the C6-7 distribution. Dr. Naiman diagnosed aggravation of chronic cervical syndrome and a prior left C5-6 disc herniation. He indicated that appellant's symptoms dated to 1996 and that the injury of July 18, 2000 was an aggravation of her chronic cervical syndrome. Dr. Naiman opined that appellant had reached maximum medical improvement and could return to light-duty work. He submitted a December 20, 2004 work capacity evaluation setting forth her work restrictions. Dr. Naiman advised that appellant could not engage in operating a motor vehicle and was generally limited in repetitive movements of the wrists and elbows. He advised that appellant could work for four to six hours per day and that the restrictions would apply for one month.

The Board finds that, under the circumstances of this case, the opinion of Dr. Naiman 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. Naiman reviewed the entire case record and statement of accepted facts and examined appellant. He determined that appellant could work within specified restrictions for four to six hours daily. Dr. Naiman's opinion is entitled to special weight and establishes that appellant had the physical capacity for limited-duty work.

The record reflects that the physical restrictions of the modified position offered to appellant on February 17, 2005 conform to the restrictions provided by Dr. Naiman. The job offer advised that appellant would work as a rehabilitation letter carrier with a tour of duty from 8:00 a.m. to 12:00 p.m. for the first week, 8:00 a.m. to 1:00 p.m. for the second week, and from 8:00 a.m. to 2:00 p.m. for the third week forward. The Board finds that the physical requirements of the offered position are consistent with the work restrictions set forth by Dr. Naiman and that the offered position is medically suitable to appellant's work restrictions.

To properly terminate compensation under section 8106(c), the Office must provide appellant notice of its finding that an offered position is suitable and give her an opportunity to accept or provide reasons for declining the position.[12] The Office properly followed its

[10] 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."

[11] *Solomon Polen*, 51 ECAB 341 (2000).

[12] *See Maggie L. Moore*, *supra* note 6.

procedural requirements in this case. By letter dated March 3, 2005, the Office advised appellant that a partially disabled employee who refused suitable work was not entitled to compensation. It found that the offered position was suitable and allotted her 30 days to either accept or provide reasons for refusing the position.[13] In response, appellant contended that she was unable to either accept or reject the job offer of February 17, 2005 because she was not provided with a copy of the referee physician's report. She submitted reports from Dr. Brennan, who repeated his diagnoses and advised that appellant continued to be totally disabled. This evidence is insufficient to show that the offered position was not medically suitable. Dr. Brennan's treatment notes merely reflected appellant's symptoms but did not address the suitability of the offered position. His opinion did not adequately explain how appellant's medical conditions prevented her return to work in the modified position. Dr. Brennan repeated his opinion that she was totally disabled, an opinion which gave rise to the conflict in medical opinion. His reports Dr. Brennan are not sufficient to establish that appellant could not perform the offered position.[14] The weight of the medical evidence establishes that, at the time the job offer was made, appellant was capable of performing the modified position.

On June 1, 2005 the Office advised appellant that her reasons given for not accepting the job offer were unacceptable. The Office advised that she had 15 days to accept the offer and if she did not, a final decision under 5 U.S.C. § 8106(c)(2) would be made. In a June 14, 2005 letter, appellant informed the Office that she was willing to accept the job offer "under protest." She subsequently advised that she would accept the job offer; however, the record reveals that the employing establishment allowed her an opportunity to secure child care and report for duty by June 27, 2005. Appellant did not report to work on that date. She submitted a June 7, 2005 report of Dr. Brennan who noted findings similar to those in his prior reports but he did not specifically address the duties of the offered position. The report of Dr. Brennan is not sufficient to establish that appellant could not perform the offered position. Therefore, appellant did not submit any medical evidence to show that the offered position was not medically suitable.[15] Thus, under section 8106(c) of the Act, her compensation was properly terminated. The Office met its burden of proof to terminate appellant's compensation based on her refusal of suitable work. The burden then shifted to appellant to show that her refusal to work in that position was justified.[16]

Following the Office's June 29, 2005 decision, appellant submitted a signed rehabilitation job offer dated July 5, 2005 "under protest." She indicated that she called the employing establishment on June 24, 2005 informing it that she was unable to secure child care services until July 1, 2005 and would sign the job offer if she was permitted to include an addendum incorporating the restrictions of Dr. Brennan. The addendum was refused by the employing establishment and the record reflects that appellant again refused the job offer.

[13] *See Bruce Sanborn*, 49 ECAB 176 (1997).

[14] *See Gayle Harris*, 52 ECAB 319 (2001).

[15] *See Les Rich*, 54 ECAB 290 (2003).

[16] *See Ronald M. Jones*, 52 ECAB 190 (2000).

After wage-loss benefits were terminated appellant submitted additional reports from Dr. Brennan who again diagnosed low back pain, heel spurs, myofascial pain syndrome, status post work-related injury while driving, rule out carpal tunnel syndrome and stated that she remained totally disabled. However, these reports are insufficient to establish that the position offered appellant was unsuitable as the physician did not provide a reasoned 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.

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.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 24, 2006 and June 29, 2005 are affirmed.

Issued: March 6, 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