United States Department of Labor
Employees' Compensation Appeals Board

D.M., Appellant	)	
and	)	**Docket No. 07-1420**
	)	**Issued: November 8, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Mechanicsburg, PA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 1, 2007 appellant filed a timely appeal from the April 18, 2007 decision of the Office of Workers' Compensation Programs terminating her wage-loss compensation for refusing an offer of suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation benefits effective April 18, 2007 on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On May 21, 2005 appellant injured her arm and back while lifting a tray of mail. She was disabled from work until August 1, 2004, when she returned to a light-duty position for four hours per day, every other day. On September 23, 2005 the Office accepted appellant's claim for sprain of the cervical spine and upper left arm. On November 7, 2005 she began working five hours per day, five days per week.

On May 17, 2006 the Office referred appellant to Dr. Perry Eagle, a Board-certified orthopedic surgeon, for a second opinion examination. On June 14, 2006 Dr. Eagle conducted a review of the medical history and a physical examination. He noted that a functional capacity examination report dated May 10, 2006 concluded that appellant was capable of medium work activities. Dr. Eagle found that appellant could rotate her head 75 degrees in both directions, flex to 45 degrees, extend to 40 degrees and laterally tilt to 25 degrees. He noted no pain, muscle spasms or guarding in the neck during active range of motion. Dr. Eagle stated that appellant had mild alternating contraction and relaxation of the deltoid, bicep, tricep, wrist dorsiflexor and hand muscles in the left arm, but no weakness. He reported that she complained of decreased sensation and tingling on her left hand and fingers. Dr. Eagle stated that x-rays taken in his office revealed that appellant's cervical spine was within normal limits and gave no evidence of osteophytosis, fracture, subluxation or misalignment. He noted that a July 2004 magnetic resonance imaging (MRI) scan was reported as negative, but that a June 2005 MRI scan was reported as showing disc bulging at C3-4 and less extensively at C4-5, mild hypertrophic spurring and possible mild foraminal narrowing at C3-4 through C5-6.

Dr. Eagle found that there were no objective physical or diagnostic findings that indicated permanent physical impairment or physical limitations. He found that appellant could work in her normal position for eight hours a day, but that she should work under restrictions for six months. Dr. Eagle based the restrictions on appellant's subjective complaints of pain, noting that some people with cervical sprain may continue to have some subjective complaints. He stated that appellant was limited to four hours of pushing 30 pounds, pulling 50 pounds, and lifting 25 pounds.

On June 29, 2006 the Office asked appellant's treating physician, Dr. Kathleen Sempeles, a family practitioner, to comment on Dr. Eagle's report. On July 14, 2006 Dr. Sempeles stated that she did not agree with Dr. Eagle's recommendations that appellant could work eight hours a day for five days in a row. She indicated that appellant continued to experience significant chronic pain despite several kinds of treatment. Dr. Sempeles explained that, because appellant experienced severe pain after working consecutive days or many hours in one day, she was only able to work five hours per day, four days a week. She also stated that appellant should be restricted to lifting 15 to 25 pounds on an intermittent basis and 15 pounds on a continuous basis. Dr. Sempeles noted that her recommendations were based on the functional capacity evaluation conducted in May 2006.

On September 29, 2006 Dr. Sempeles updated appellant's restrictions to five hours of work per day, five days per week. She stated that appellant's condition was aggravated by pushing, pulling and overhead work, especially when done continuously. Dr. Sempeles stated that appellant was limited to 15 pounds of weight.

The Office found that there was a conflict of medical opinion between Dr. Eagle and Dr. Sempeles over the extent of appellant's physical limitations. On November 3, 2006 appellant was referred to Dr. Thomas Green, a Board-certified orthopedic surgeon, selected as the impartial medical specialist. In a report dated November 20, 2006, Dr. Green found that the problematic aspects of appellant's regular-duty position were reaching down into a container to collect mail and lifting packages or bags of up to 70 pounds. He reviewed appellant's medical history and noted that she required ongoing treatment to deal with her pain. On physical

examination, Dr. Green found that appellant had full cervical range of motion in rotation, flexion, extension and side bending. He noted a subtle tightness in the muscles on left rotation of the neck that would be difficult to measure. Dr. Green stated that there was also tightness in the trapezius muscles, but no spasm or loss of strength. He found normal reflexes and sensation in both upper extremities. He noted diminished strength of 4/5 in the left shoulder girdle, related primarily to the arm muscles.

Based on his physical examination, Dr. Green diagnosed chronic cervical strain and found that it was directly correlated to her employment injury by medical history. He stated that there was "reason to believe" that appellant had a stable mild neuritis in the shoulder that accounted for her slight weakness in abducting, flexing and extending her left shoulder. Dr. Green found that her MRI reports indicated that she had degenerative disc disease with a slight posterior disc protrusion at C3-4. Because he knew of no preexisting problems or impairments that would account for the three diagnoses he made, he found that all of these conditions were related to her accepted employment injury. Dr. Green stated that appellant had reached maximum medical improvement and should continue to be treated conservatively to relieve her ongoing pain. After reviewing appellant's job description, he recommended against lifting more than 20 pounds. Because of her short stature and the stress of bending forward with, he opined that she should not gather mail from a deep container that would require forward bending. Dr. Green stated that appellant was "probably better suited to a sit-down job of sorting mail." On a work capacity evaluation form dated December 28, 2006, Dr. Green stated that appellant was able to work eight hours per day with restrictions against reaching down, bending or stooping for more than two hours, and lifting 15 pounds for more than half of an hour. He found that she was able to sit, stand and walk for eight hours a day.

On January 18, 2007 the Office notified the employing establishment of Dr. Green's restrictions. It inquired as to whether modified duty was available to meet appellant's work restrictions.

On January 25, 2007 appellant contended that she was unable to work eight hours per day. She provided a report from Dr. Sempeles and a May 2006 functional capacity evaluation report that indicated she was capable of working only four to six hours per day. In the functional capacity evaluation report, the occupational rehabilitations specialists found that appellant could perform at the medium level, but lacked the stamina to perform her job for eight hours per day.

On February 2, 2007 the employing establishment offered appellant the modified position of distribution markup clerk. It noted physical restrictions against bending or stooping for more than two hours and lifting 15 pounds for more than one and a half hours. The duties included four to eight hours of manually sorting mail from a utility cart while sitting or standing, four to eight hours of sorting parcels weighing less than 15 pounds while standing, verifying mail while sitting as needed, counting and scanning mail while sitting as needed, and various administrative duties while sitting and standing as assigned. The employing establishment requested a suitability determination on this position.

On February 10, 2007 appellant declined the offered limited-duty position. She stated that her physician had not released her to eight hours a day of work and, when she sorted flats for two hours the previous day, her back was in a great deal of pain.

On February 16, 2007 the Office discussed appellant's sorting duties with the employing establishment. The Office determined that appellant would not be required to bend or stoop to retrieve mail from a utility cart, which can stand or tilt to be accessed from a seated position. By notice dated February 16, 2007, the Office found the offered position to be suitable. The Office advised appellant that she had 30 days to either accept the position or provide an explanation for refusing it. It also informed her that her compensation could be terminated for her refusal to accept the position.

On February 20, 2007 Dr. Sempeles stated that appellant could increase her work hours to six hours per day, five days per week, with half of the hours to be completed while sitting. She stated that, if appellant's pain syndrome worsened, she would need to return to a four-hour-per-day schedule.

On March 12, 2007 appellant informed the Office that she could not accept the offered position because she could not work eight hours a day. She stated that since she began working six hours per day on February 21, 2007 she had experienced an increase in back pain and that her face and arm had started to feel numb again. Appellant reported that she had been standing during most of her working hours and when she was able to sit, the chair did not have a back. She requested that she be given a chair with a back and that the position be altered to six hours per day, rather than eight.

By notice dated March 20, 2007, the Office found that appellant's statements, the functional capacity evaluation and reports from Dr. Sempeles were not sufficient to establish that the offered position was not suitable to appellant's condition. The Office stated that no further reasons for refusal would be accepted and that, if she did not accept the offered job within 15 days, her entitlement to wage loss and schedule award benefits could be terminated. Appellant did not accept the position.

By decision dated April 18, 2007, the Office terminated appellant's wage-loss compensation benefits based on her refusal to accept suitable work. The Office found that the opinion of Dr. Green, the impartial medical specialist, carried the weight of the medical opinion evidence because his examination was thorough, unequivocal and based on relevant evidence. As the impartial medical examiner, Dr. Green's opinion was entitled to special weight.

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees' Compensation 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."[1] However, to justify such termination, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[2] Before compensation can be terminated, the Office has the burden of demonstrating that the employee can work, setting forth specific restrictions, if any, on

[1] 5 U.S.C. § 8106(c)(2).

[2] *See John E. Lemker*, 45 ECAB 258, 263 (1993).

the employee's ability to work. The Office must also establish that a position has been offered within the employee's work restrictions, setting for the specific job requirements of the position.[3] An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[4]

Section 8123(a) of the Act states: "If there is 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."[5] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[6] In situations where 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.[7]

ANALYSIS

The Office accepted that appellant sustained strains to her cervical spine and upper left arm and paid appropriate compensation for periods of disability. The Office terminated appellant's wage-loss compensation effective April 18, 2007 on the grounds that she refused an offer of suitable work. The Board finds that the Office met its burden of establishing that the work offered was suitable and that appellant failed to show that her refusal to accept the job offer was reasonable or justified.

In order to resolve the conflict of medical opinion evidence between appellant's treating physician and the second opinion physician regarding appropriate work restrictions, the Office referred appellant to Dr. Green, a Board-certified orthopedic surgeon, who reviewed appellant's medical records and conducted a thorough physical examination. He found that appellant had full cervical range of motion in rotation, flexion, extension and side bending, though she did have muscle tightness on the left side of her neck and the trapezius area. Appellant had normal reflexes and sensation in both upper extremities, but diminished strength in the left shoulder girdle, related primarily to the arm muscles. Based on his physical examination and the medical history, Dr. Green diagnosed chronic cervical strain, mild neuritis in the shoulder and degenerative disc disease with a slight posterior disc protrusion at C3-4. He found that all of these conditions were related to appellant's accepted employment injury. Dr. Green stated that appellant had reached maximum medical improvement and should continue to be treated conservatively to relieve her ongoing pain.

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[3] *Linda Hilton*, 52 ECAB 476, 481 (2001).

[4] 20 C.F.R. § 10.124; *see Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

[5] 5 U.S.C. § 8123(a).

[6] *William C. Bush*, 40 ECAB 1064, 1075 (1989).

[7] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

Dr. Green noted that the problematic aspects of appellant's regular-duty position were the requirements of lifting packages or bags of up to 70 pounds and reaching down into a container to collect mail. Therefore, he stated that she should lift no more than 20 pounds and, because of her short stature and the stress of bending forward, he opined that she should not gather mail from a container that would require forward bending. Though Dr. Green stated that appellant was "probably better suited to a sit-down job of sorting mail," he found that she was able to sit, stand and walk for eight hours a day. On the work capacity evaluation form, Dr. Green stated that appellant was able to work eight hours per day with restrictions against reaching down, bending or stooping for more than two hours, and lifting 15 pounds for more than half of an hour. The Board finds that the opinion of Dr. Green is entitled to the special weight of the medical evidence because it is sufficiently well rationalized and based on proper factual background.

On the basis of the work restrictions set out by Dr. Green, the employing establishment offered appellant the modified light-duty position of distribution markup clerk. The duties included four to eight hours of manually sorting mail from a utility cart while sitting or standing, four to eight hours of sorting parcels weighing less than 15 pounds while standing, verifying mail while sitting as needed, counting and scanning mail while sitting as needed, and various administrative duties while sitting and standing as assigned. The Board finds that the requirements of the modified distribution markup clerk were within the work restrictions delineated by Dr. Green.[8]

After determining that appellant's sorting duties would not require her to bend over, on February 16, 2007 the Office properly notified appellant that the position was suitable under the restrictions set forth by Dr. Green. The Office advised her that she had 30 days to accept the position or provide an explanation for refusing it. On March 12, 2007 appellant stated that she could not accept the position because she was unable to work for eight hours a day. In support of this position, Dr. Sempeles, appellant's family practitioner, stated on February 20, 2007 that appellant could work for only six hours per day, three of which needed to be sitting. The Board notes that, once the Office has established that a particular position is suitable, an employee who refuses the position has the burden of showing that such refusal was justified.[9] The issue of whether appellant is able to perform an offered position is primarily a medical one and must be resolved by medical evidence.[10] The Board finds that the opinion of Dr. Sempeles, who was on one side of the conflict in medical opinion, does not overcome the special weight of the medical evidence as set out by Dr. Green.[11] The Board finds that appellant did not meet the burden of showing that her refusal to accept the position was justified.

[8] The Board notes that the employing establishment incorrectly stated that the restriction against lifting 15 pounds was for more than one and a half hours, rather than half of an hour. However, as the position does not appear to require lifting anything weighing more than 15 pounds, this mistake is harmless.

[9] *Brian O. Crane*, 56 ECAB __ (Docket No. 05-232, issued September 2, 2005).

[10] *Kathy E. Murray*, 55 ECAB 288, 290 (2004).

[11] *See Jaja K. Asaramo*, 55 ECAB 200, 205 (2004) (the additional report of the physician who had been on one side of the conflict resolved by the impartial medical examiner was insufficient to overcome the weight accorded to the opinion of the impartial medical examiner or create a new conflict).

On March 20, 2007 the Office informed appellant that she had failed to provide valid reasons for refusing the offered position and allowed her 15 additional days to accept it. Because appellant did not accept the position within the allotted time, the Office terminated her benefits. The Board finds that the termination of appellant's benefits was proper because the Office met its burden of proving that the modified distribution markup clerk position offered by the employing establishment was suitable at the time it was offered and that appellant was informed of the consequences of her refusal to accept the offered position.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation benefits effective April 18, 2007 on the grounds that she refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 18, 2007 is affirmed.

Issued: November 8, 2007
Washington, DC

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

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

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