United States Department of Labor
Employees' Compensation Appeals Board

R.R., Appellant	)	
and	)	**Docket No. 07-272**
	)	**Issued: September 20, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Orangevale, CA, Employer	)	

Appearances:
Martin Kaplan, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On November 8, 2006 appellant filed an appeal of decisions of the Office of Workers' Compensation Programs dated June 6 and October 2, 2006, which terminated her wage-loss compensation on the grounds that she refused 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 the case.

ISSUE

The issue is whether the Office properly terminated appellant's wage-loss compensation on June 11, 2006 pursuant to 5 U.S.C. § 8106(a). On appeal, appellant's attorney contends that the offered position was not suitable because it was temporary and part time.

FACTUAL HISTORY

On July 8, 2002 appellant, then a 28-year-old city carrier, filed a Form CA-1, traumatic injury claim, alleging that on July 6, 2001 she injured her back. The Office accepted that appellant sustained an employment-related lumbar strain/sprain and she began working limited duty. She stopped work on September 23, 2002 and received wage-loss compensation. Appellant returned to four hours of sedentary duty on January 17, 2003 and continued to receive

compensation for four hours a day. She again stopped work on June 19, 2003 and was placed on the periodic rolls.

On July 2, 2003 the Office referred appellant to Dr. Thomas J. Mampalam, a Board-certified neurosurgeon, for a second opinion evaluation. The Office subsequently found that a conflict in medical evidence was created between the opinions of Dr. Mampalam, and Dr. Craig N. Pfeiffer, an attending Board-certified neurosurgeon, regarding the need for back surgery. It referred appellant to Dr. Gordon D. Lewis, a Board-certified orthopedic surgeon, for an impartial evaluation. In reports dated January 8 and 11, 2004, Dr. Lewis advised that appellant could work four hours a day with restrictions and opined that she did not need surgery.

By decision dated March 25, 2004, the Office denied appellant's request for surgery and accepted that she sustained aggravation of preexisting lumbar disc disease and an L5-S1 left-sided disc herniation. A March 30, 2004 functional capacity evaluation demonstrated that she could work at a medium level of physical activity for eight hours a day. In April 2004, appellant was referred for vocational rehabilitation. On May 6, 2004 she returned to limited duty for four hours a day.

Appellant stopped work on August 14, 2004 and was returned to temporary total disability. On August 17, 2004 she requested reconsideration of the March 25, 2004 decision denying her surgery request. On October 9, 2004 appellant returned to work for four hours a day. She missed intermittent periods thereafter and stopped work completely on January 8, 2005.

By report dated January 19, 2005, Dr. Mark W. Hawk, a Board-certified neurosurgeon, advised that appellant could work eight hours a day with a 20-pound lifting restriction, no climbing, bending or stooping. Sitting was restricted to 2 hours with breaks of 30 minutes every 2 hours. In a February 16, 2005 decision, the Office denied modification of the March 25, 2004 decision denying authorization for surgery. On March 2, 2005 appellant accepted a job offer for four hours a day. On March 24, 2005 she refused an offer for a modified position for eight hours a day. The March 24, 2005 offer complied with the restrictions provided in Dr. Hawk's January 19, 2005 report, who appended a comment to the job offer, stating: "[Patient] states that current restrictions do not allow her to function at work." In a March 28, 2005 report, Dr. Fred Rowe, Board-certified in emergency medicine, advised that appellant could return to full duty on March 31, 2005.

In a March 30, 2005 letter, the Office advised appellant that the position offered was suitable. She was notified of the penalty provisions of section 8106 of the Federal Employees' Compensation Act[1] and was given 30 days to respond. In a form report dated April 8, 2005, Dr. Hawk advised that appellant could work 4 hours a day for 20 hours a week. On May 18, 2005 the employing establishment advised that appellant was not working and that the offered position remained available. By letter dated June 15, 2005, the Office requested that appellant submit an updated report from Dr. Hawk in support of her claim for disability. In a report dated July 12, 2005, Dr. Donald Matthews, a Board-certified orthopedic surgeon, reviewed a discogram and advised that appellant had three-level degenerative disc disease, that surgery

[1] 5 U.S.C. §§ 8101-8193.

would not improve her condition and that she could not be a postal worker. He opined that she needed vocational rehabilitation. In a form report also dated July 12, 2005, Dr. Matthews advised that appellant could return to modified duty that day. On August 8, 2005 he advised that appellant was permanently disabled. In an August 11, 2005 report, Dr. Hawk advised that he agreed with Dr. Matthews' work restrictions. Appellant continued to receive wage-loss compensation for four hours a day.[2]

On December 7, 2005 the Office referred appellant to Dr. Matthew Mitchell, a Board-certified orthopedic surgeon, for a second opinion evaluation. In reports dated January 17, 2006, Dr. Mitchell noted appellant's chief complaint of low back pain, the history of injury and his review of the statement of accepted facts and medical record. Physical examination findings included no pain on compression of her head, rotation of her upper torso, or light touch in the lumbar spine. Straight leg raising test was negative in both sitting and supine positions. Strength was 5/5 and she had intact lower extremity sensation and normal deep tendon reflexes. Dr. Mitchell diagnosed lumbar degenerative disease, left L5-S1 disc herniation and lumbar strain. He opined that the degenerative disc disease preexisted the employment injury but that work activities caused the disc herniation, a permanent aggravation. Dr. Mitchell advised that appellant was not totally disabled and could return to modified work for four hours a day that day and, after three months, could return to an eight-hour workday. He provided a four-hour restriction to sitting, walking and standing, with squatting, kneeling, climbing, bending, stooping and twisting limited to two hours with a 25-pound weight restriction.

On February 13, 2006 the employing establishment offered appellant a modified-duty position for four hours a day for the period February 10 to May 10, 2006. The job was described as "casing mail on routes to be determined daily, verify undeliverable bulk business mail, return to sender mail; answer telephones; write up second notices on accountable mail; passports and other duties as assigned within your limitations, which were two hours of intermittent lifting, bending, pushing and pulling, twisting and climbing, and four hours of sitting, walking and standing with a 25[-]pound lifting restriction." Appellant indicated her acceptance of the position on February 27, 2006.

On a form report dated January 28, 2006, Dr. Matthews advised that appellant was totally disabled for the period March 1 to 28, 2006. In a report dated March 8, 2006, he advised that he discontinued appellant's total disability on January 17, 2006 as she was no longer on narcotic medication, her range of motion of the lumbar spine was relatively normal and she had relatively normal strength in her lower legs.

On March 22, 2006 the employing establishment informed the Office that the offered position remained open. By letter that day, the Office advised appellant that a partially disabled

[2] On August 4, 2005 the Office informed appellant that, due to a computer error, a duplicate compensation check was issued for the period June 24 to July 4, 2005 and, therefore, an overpayment in compensation in the amount of $546.26 had been created. The Office finalized the overpayment by decision dated September 14, 2005. Appellant did not file an appeal of this decision with the Board. She also submitted Forms CA-7, claims for total disability compensation for the period January 22 to November 10, 2005. The Office has not issued a final decision as to whether appellant was entitled to an additional four hours of wage-loss compensation per day for this period. The Board's jurisdiction is limited to reviewing final decisions of the Office and extends only to those final decisions issued within one year prior to the filing of the appeal. *Charles W. Downey*, 54 ECAB 421 (2003).

employee who refused suitable work was not entitled to compensation and that the offered position was suitable. Appellant was notified of the penalty provisions of section 8106 of the Act and given 30 days to respond. On April 4, 2006 Dr. Matthews advised that appellant was totally disabled for the period April 11, 2005 to April 11, 2007, stating that "she may need to file for perm[anent] disability." On April 5, 2006 appellant retracted her February 28, 2006 acceptance of the offered position, stating that Dr. Matthews told her she should be off work for another year. By letter dated May 11, 2006, the Office advised appellant that her reasons for refusing the offered position were not acceptable and she was given an additional 15 days to accept the job offer. In a May 30, 2006 report, Dr. Matthews advised that appellant could perhaps work 4 hours a day with sitting, walking, standing, reaching, repetitive movements, pushing, pulling, lifting, kneeling and climbing restricted to 4 hours a day, with no reaching above her shoulder, twisting, bending or stooping, with a 10-pound lifting restriction and 15-minute breaks every 2 hours.

By decision dated June 6, 2006, the Office terminated appellant's wage-loss compensation, effective June 11, 2006, on the grounds that she refused an offer of suitable work.

On June 16, 2006 appellant, through her attorney, requested a review of the written record. Counsel contended that the offered position was not suitable because it was temporary and part time. In a June 21, 2006 report, Dr. Hans U. Bueff, Board-certified in orthopedic surgery, noted appellant's complaint of low back pain with mild leg pain. Physical findings included back tenderness and decreased, painful range of motion. Motor and sensory examinations were within normal limits and straight leg raising test was negative. Dr. Bueff described discogram findings of severe L5-S1 degenerative disc disease and diagnosed low back pain due to lumbar spondylosis, most severe at L5-S1 and depression exacerbated by low back pain. He recommended surgery.

A memorandum of a telephone conversation between the employing establishment and the Office on July 6, 2006 noted that the job offer was based on the restrictions provided by Dr. Mitchell on January 17, 2006 and his recommendation that appellant should begin work for four hours daily but could return to full-time employment within three months' time. By letter dated July 7, 2006, the employing establishment advised the Office that the offered position was still available and would remain so indefinitely. On July 31, 2006 the employing establishment reoffered appellant the modified position, noting that it was available as of February 10, 2006. On an August 3, 2006 form report, Dr. Bueff reiterated his findings and conclusions.[3]

In an October 2, 2006 decision, an Office hearing representative affirmed the June 6, 2006 decision.

LEGAL PRECEDENT

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."[4]

[3] Appellant also submitted numerous State of California and Kaiser Permanente form reports from Dr. Matthews and other physicians that did not contain an opinion regarding her ability to work.

[4] 5 U.S.C. § 8106(c).

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.[5] To justify such a termination, the Office must show that the work offered was suitable.[6] 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.[7] 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.[8] 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.[9] Section 8106(c) will be 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.[10] 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.[11]

ANALYSIS

The Board finds that the Office properly terminated appellant's compensation for refusal to accept suitable work. The employing establishment offered appellant a modified position with physical restrictions that followed those recommended by Dr. Mitchell, who had provided a second opinion evaluation for the Office. He advised that appellant could begin work for four hours a day and, in three months, work up to an eight-hour day. The offered position was also in agreement with the restrictions provided by Dr. Mitchell of a four-hour restriction to sitting, walking and standing, with squatting, kneeling, climbing, bending, stooping and twisting limited to two hours with a 25-pound weight restriction. In a supplementary report dated March 8, 2006, Dr. Mitchell advised that his reason for discontinuing appellant's total disability on January 17, 2006 was supported by the fact that she was no longer on narcotic medication, her range of motion of the lumbar spine was relatively normal and she had relatively normal strength in her lower legs.

Neither the June 21, 2006 nor the August 3, 2006 report submitted by Dr. Bueff provided any opinion regarding appellant's ability to work. It is well established that medical evidence

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

[6] *Id.*

[7] 20 C.F.R. § 10.517(a).

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

[9] 20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB 681 (2004).

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

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

which does not offer an opinion on a given medical question is of limited probative value on that issue.[12] Similarly, the many form reports appellant submitted did not provide any opinion regarding appellant's capacity for work.[13]

In a report dated January 19, 2005, Dr. Hawk advised that appellant could work eight hours a day with restrictions. On March 28, 2005 Dr. Rowe advised that she could return to full duty on March 31, 2005. Dr. Matthews advised on April 4, 2006 that appellant was totally disabled for the period April 11, 2005 to April 11, 2007. On May 30, 2006 he advised that appellant could perhaps work 4 hours a day with sitting, walking, standing, reaching, repetitive movements, pushing, pulling, lifting, kneeling and climbing restricted to 4 hours a day, with no reaching above her shoulder, twisting, bending or stooping, with a 10-pound lifting restriction and 15-minute breaks every 2 hours. Other than the difference in the lifting restriction, Dr. Matthews' report is essentially in agreement with that of Dr. Mitchell. Dr. Matthews, however, provided no explanation for his conclusions and a medical opinion not fortified by medical rationale is of little probative value.[14] As stated above, Dr. Mitchell provided medical justification for his findings and conclusions.

Appellant contended on appeal that the offered position was temporary and part time. The Board notes that, while the initial job offer was for a three-month period, on March 22, 2006 the employing establishment advised that the position remained open and available. Because Dr. Mitchell advised that appellant could return to full-time work three months after January 17, 2006, the original offer for employment of four hours a day was based on this assessment. The employing establishment assured that the position remained available. The position, therefore, is not temporary. Furthermore, even though the offered position was for four hours a day, appellant had been working this schedule since January 17, 2003 and had received wage-loss compensation for four hours a day. Had she accepted the offered position, she would have continued to receive compensation for four hours a day. Neither Office regulations nor Office procedures prohibit a part-time suitability offer.[15] Office procedures merely advise that a job is not suitable if it involves less than four hours of work per day when the claimant is capable or working four or more hours per day.[16] The Board, therefore, concludes that the weight of the medical evidence rests with the well-rationalized opinion of Dr. Mitchell, which was based on a proper factual background and establishes that appellant could physically perform the duties of the offered position.[17]

In order to properly terminate appellant's compensation under section 8106, the Office must provide her notice of its finding that an offered position is suitable and give appellant an

[12] *See generally A.D.*, 58 ECAB ____ (Docket No. 06-1183, issued November 14, 2006).

[13] *Supra* note 3.

[14] *Charles W. Downey*, *supra* note 2.

[15] *See* 20 C.F.R. § 10.507; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4 (July 1997).

[16] Federal (FECA) Procedure Manual, *id.* at Chapter 2.814.4b(1).

[17] *Gayle Harris*, *supra* note 11.

opportunity to accept or provide reasons for declining the position.[18] The record established that the Office properly followed the procedural requirements. By letter dated March 22, 2006, the Office advised appellant that a partially disabled employee who refused suitable work was not entitled to compensation and that the offered position had been found suitable. Appellant was notified of the penalty provision of section 8106 and allotted 30 days to either accept or provide reasons for refusing the position. In a letter dated May 11, 2006, the Office advised appellant that the reasons given for not accepting the job offer were unacceptable. She was given an additional 15 days in which to accept the position. There is no evidence of any procedural defect in this case. The Office provided appellant with proper notice. She was offered a suitable position by the employing establishment and such offer was refused. Thus, under section 8106 of the Act, appellant's compensation was properly terminated effective June 11, 2006 on the grounds that she refused an offer of suitable work.[19]

CONCLUSION

The Board finds that the Office properly terminated appellant's wage-loss compensation effective June 11, 2006 pursuant to 5 U.S.C. § 8106(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 2 and June 6, 2006 be affirmed.

Issued: September 20, 2007
Washington, DC

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

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

[18] *See Maggie L. Moore*, *supra* note 8.

[19] *Joyce M. Doll*, *supra* note 5.