

**United States Department of Labor
Employees' Compensation Appeals Board**

J.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Fort Worth, TX, Employer**

)
)
)
)
)
)
)
)
)
)

**Docket No. 07-1994
Issued: April 18, 2008**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 25, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' December 14, 2006 and April 4, 2007 merit decisions concerning the termination of her compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation effective December 14, 2006 on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

The Office accepted that on August 5, 2005 appellant, then a 57-year-old mail processing clerk, sustained closed fractures of her right supracondyle humerus and radius head, left knee and leg sprain/strain, internal derangement of her left knee, deviated nasal septum, left hip fracture, postconcussions, left shoulder strain/sprain, and excessive attrition of her number eight tooth when she fell forward to the ground. The Office paid compensation for periods of disability. On

December 9, 2005 appellant underwent open reduction and internal fixation for a subcapital fracture of her left proximal femur.¹ On June 30, 2006 she underwent a medial and lateral meniscectomy.

On August 15, 2006 Dr. Jerry Gurkoff, an attending osteopath, completed a work capacity evaluation form (OWCP-5c). In the portion of the form asking whether appellant could work eight hours per day with restrictions, Dr. Gurkoff checked a “no” box and stated, “Unable to stand or lift....” He checked a “yes” box indicating that he anticipated appellant would be able to increase her work hours and in the portion of the form asking when appellant could work eight hours per day, he stated, “probably four to six weeks after left shoulder repair.”² In the portion of the form asking whether there were “other medical factors, equipment or devices which needed to be considered in the identification of a position” for appellant, Dr. Gurkoff stated, “[Ears, nose, throat] -- nasal (gum, teeth in front, unrepaired left shoulder -- resolving left hip fracture -- knee surgery).” In the portion of the form for work restrictions, he indicated that appellant could sit for eight hours per day, engage in repetitive hand and elbow motion for eight hours, walk, and stand or twist for one to two hours, but could not bend, stoop, squat, kneel, or climb. Dr. Gurkoff stated that appellant could not reach, lift, push or pull with her left arm.

In an August 15, 2006 report, Dr. Gurkoff stated that appellant was not finished with therapy on her left knee and indicated that it was stiff and sore and that her motion varied. He stated that she needed “a good strong leg” and added that “she is simply not there.” Dr. Gurkoff noted:

“Lastly discussion is made with regard to return to work and restrictions. I believe that all are aware that the treatment to the left leg (knee and hip) are not concluded and that the facial/[ears, nose, throat]/dental issues and her left shoulder are not yet attended or corrected. Given those limitations guidelines are proposed.”

On August 30, 2006 the employing establishment offered appellant a job as a modified mail processing clerk for eight hours per day. The job involved sitting or standing while lifting mail and placing it in slots in a mail case and required fair strength in both hands³ and walking several hundred feet to walk to and from the parking lot, time clock, restroom and cafeteria. The duties required frequent lifting with either hand to mid chest level and continuous handling, grasping, fingering with either hand. The job did not require crouching, stooping, kneeling, crawling, climbing, twisting, pushing or pulling.

¹ This surgery was necessitated by a fall appellant sustained at home on December 7, 2005 when her left knee buckled.

² In additional partially legible notes in this section, Dr. Gurkoff made note of ears, nose, throat and dental problems.

³ Each piece of mail was required to weigh less than 16 ounces.

In an August 31, 2006 report, Dr. Gurkoff indicated that he had seen a description of the modified mail processing clerk position offered by the employing establishment. Dr. Gurkoff stated:

“She has not finished [physical therapy] on her lower extremities, is still walking with a cane at times, has not had the proposed surgery done on her nose and her shoulder is an unattended area.”

* * *

“I did make for [appellant] a profile of what restrictions she might have upon return to work, but never was it my understanding that an order to return would precede her completion of therapy, resolution of the nasal problem, and the shoulder dysfunction.”

In a September 11, 2006 letter, the Office advised appellant of its determination that the modified mail processing clerk position was suitable. The Office noted that her compensation would be terminated if she did not accept the position or provide justification for not accepting it within 30 days of the date of the letter.

Appellant resubmitted the August 15 and 31, 2006 narrative reports of Dr. Gurkoff and a September 13, 2006 note in which the physician indicated that she needed a psychological evaluation.

In an October 18, 2006 letter, the Office noted that appellant refused to accept the modified mail processing clerk position and it had considered her reasons for not accepting the position but did not find them to be valid. The Office advised appellant that her compensation would be terminated if she did not accept the position within 15 days of the letter.

Appellant submitted a November 3, 2006 report in which Graciela M. Valenzuela, a licensed professional counselor, diagnosed an adjustment disorder with mixed anxiety and depressed mood. In an October 30, 2006 report, Dr. Gurkoff stated:

“[Appellant] is rechecked and she has had her nose fixed, feels somewhat better and is having some hip pain with weather changes. That is not unusual. She is filmed and the hip is healed, the bone satisfactory, joint space maintained.... Her left knee is fine, occasional complaints but nothing unusual or unexpected.”

In a December 14, 2006 decision, the Office terminated appellant’s compensation effective December 14, 2006 on the grounds that she had refused an offer of suitable work. The Office found that the Form OWCP-5c completed by Dr. Gurkoff on August 15, 2006 showed that she could perform the modified mail processing clerk position.

Appellant submitted numerous medical records from 2005, many of which were previously of record. In a December 21, 2006 report, Dr. Gurkoff stated that appellant showed him the Office’s termination decision. He noted, “[Appellant] has things that need repaired before she could return to work and quite frankly she will need now to waste time and find out what is ‘permitted’ and what is not.”

Appellant requested a review of the written record by an Office hearing representative. In a January 8, 2007 report, Dr. Gurkoff recommended surgery for the impingement of her left shoulder and indicated that the surgery would have to be followed by physical therapy to “return function to near normal.” In a January 11, 2007 report, he stated, “At the present time [appellant] is unable to return to work until further notice, pending left rotator cuff surgery.”

In an April 4, 2007 decision, the Office hearing representative affirmed the Office’s December 14, 2006 decision.⁴

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.”⁵ However, to justify such termination, the Office must show that the work offered was suitable.⁶ 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.⁷

ANALYSIS

The Office accepted that on August 5, 2005 appellant sustained closed fractures of her right supracondyle humerus and radius head, left knee and leg sprain/strain, internal derangement of her left knee, deviated nasal septum, left hip fracture, postconcussions, left shoulder strain/sprain, and excessive attrition of her number eight tooth. On December 9, 2005 appellant underwent open reduction and internal fixation for a subcapital fracture of her left proximal femur. On June 30, 2006 she underwent a medial and lateral meniscectomy.

On August 30, 2006 the employing establishment offered appellant a job as a modified mail processing clerk for eight hours per day.⁸ Appellant refused the job offer, indicating that her medical condition prevented her from working. The Office based its determination that appellant could perform the job on a Form OWCP-5c completed on August 15, 2006 by Dr. Gurkoff, an attending osteopath.⁹

⁴ Appellant submitted additional evidence after the Office’s April 4, 2007 decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

⁵ 5 U.S.C. § 8106(c)(2).

⁶ *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

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

⁸ The job involved sitting or standing while lifting mail and placing it in slots in a mail case and primarily required fair strength in both hands, frequent lifting with either hand to mid chest level and continuous handling, grasping, fingering with either hand. Each piece of mail was not to weigh more than 16 ounces.

⁹ Dr. Gurkoff indicated that appellant could sit for eight hours per day, engage in repetitive hand and elbow motion for eight hours, walk, and stand or twist for one to two hours, but could not bend, stoop, squat, kneel, or climb. He stated that appellant could not reach, lift, push or pull with her left arm.

The Board notes that, although the August 15, 2006 Form OWCP-5c contains work limitations which are generally in accordance with the duties of the offered modified position, Dr. Gurkoff only intended to provide a provisional picture of duties appellant might be able to perform after certain medical conditions were addressed rather than a clear opinion about what she was able to do at the time the form was completed.

On the August 15, 2006 Form OWCP-5c, Dr. Gurkoff indicated that there were various medical problems to be resolved before appellant could return to work. In the portion of the form asking whether appellant could work eight hours per day with restrictions, Dr. Gurkoff checked a “no” box and stated, “Unable to stand or lift...” In the portion of the form asking when appellant could work eight hours per day, he stated, “probably four to six weeks after left shoulder repair.”¹⁰ In the portion of the form asking whether there were “other medical factors, equipment or devices which needed to be considered in the identification of a position” for appellant, Dr. Gurkoff stated, “[ears, nose, throat] -- nasal (gum, teeth in front, unrepaired left shoulder -- resolving left hip fracture -- knee surgery).”

Dr. Gurkoff did not opine that appellant could return to work in August 2006. He noted that the August 15, 2006 work restrictions were only provisional, as supported by his reports of this period. In an August 15, 2006 report, Dr. Gurkoff stated that appellant was not finished with therapy on her left knee and indicated that she did not yet have “a good strong leg.” Dr. Gurkoff noted with respect to appellant’s ability to return to work, “I believe that all are aware that the treatment to the left leg (knee and hip) are not concluded and that the facial/[ears, nose, throat]/dental issues and her left shoulder are not yet attended or corrected.” On August 31, 2006 Dr. Gurkoff stated that appellant had not finished physical therapy on her lower extremities, was still walking with a cane at times, did not yet have proposed nose surgery, and did not have her left shoulder problems addressed. He noted, “I did make for [appellant] a profile of what restrictions she might have upon return to work, but never was it my understanding that an order to return would precede her completion of therapy, resolution of the nasal problem, and the shoulder dysfunction.” In an October 30, 2006 report, Dr. Gurkoff indicated that some of appellant’s problems had improved, but he did not provide an opinion that appellant could return to work.

The Board finds that the medical evidence of record does not show that appellant was capable of performing the modified mail processing clerk position offered by the employing establishment in August 2006. In determining that appellant was physically capable of performing the offered position, the Office improperly relied in the opinion of Dr. Gurkoff. Therefore, the Office improperly terminated appellant’s compensation effective December 14, 2006 on the grounds that she refused an offer of suitable work.

CONCLUSION

The Board finds that the Office improperly terminated appellant’s compensation effective December 14, 2006 on the grounds that she refused an offer of suitable work.

¹⁰ In additional partially legible notes in this section, Dr. Gurkoff made note of ears, nose, throat and dental problems.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' April 4, 2007 and December 14, 2006 decisions are reversed.

Issued: April 18, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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