United States Department of Labor
Employees' Compensation Appeals Board

M.M., Appellant	)	
and	)	**Docket No. 07-2103**
	)	**Issued: August 26, 2008**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Alexandria, LA, Employer	)	

Appearances:
Daniel E. Broussard, Jr., 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 14, 2007 appellant, through her attorney, filed a timely appeal from the Office of Workers' Compensation Programs' May 21, 2007 merit decision terminating her compensation and schedule award benefits 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 this case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation benefits effective May 21, 2007 on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On September 4, 2003 appellant, a 50-year-old licensed practical nurse, filed a traumatic injury claim alleging that she injured her neck while lifting a patient. The Office accepted her claim for cervical and lumbar strain, aggravation of degenerative disc disease of the cervical and

lumbar spine and lumbar radiculopathy. Appellant stopped working on August 21, 2003, the date of injury, and the Office placed her on the periodic rolls.

Appellant was treated by Dr. Luke Corsten, a Board-certified neurosurgeon, and Dr. Michael Burdine, a treating physician. On March 11, 2004 Dr. Corsten opined that appellant was disabled from employment. On October 6, 2004 Dr. Burdine stated that she was unable to work due to significant pain in her back and leg. In a September 28, 2004 second opinion report, Dr. John Sandifer, a Board-certified orthopedic surgeon, diagnosed cervical strain, and multiple disc disease of the cervical and lumbar spine with radiculopathy. He opined that appellant was able to work part time, provided that she be restricted from pushing, pulling or lifting more than five pounds, and that she be precluded from twisting, bending, stooping or reaching above shoulder level. The record also includes reports of electromyogram (EMG) and nerve conduction studies dated December 6, 2004 and March 14, 2005 from Dr. Charles Kaufman, a Board-certified neurologist.

The Office found a conflict in medical opinion and referred appellant to Dr. Martin Bloom, a Board-certified orthopedic surgeon, to resolve the conflict. In a February 22, 2005 report, Dr. Bloom opined that appellant continued to experience residuals from her accepted employment injury, but that she was capable of performing sedentary work on a full-time basis.[1] He stated that he had reviewed a January 30, 2004 report of a magnetic resonance imaging (MRI) scan.

On April 22, 2005 the employing establishment offered appellant a limited-duty position as a medical support assistant, which encompassed Dr. Bloom's restrictions. On April 27, 2005 appellant rejected the April 22, 2005 job offer, stating that her doctors had not yet released her to work.

By letter dated May 4, 2005, the Office notified appellant that it found the medical support assistant position to be suitable, based on Dr. Bloom's February 22, 2005 report. The Office advised appellant that she had 30 days to accept the offer or provide reasons why she believed the position was not suitable. Appellant did not accept the offer within the 30-day period.

By letter dated June 8, 2005, the Office advised appellant that she had failed to provide valid reasons for refusing to accept the limited-duty job and that, if she had not accepted the position and arranged for a report date within 15 days of the date of the letter, her entitlement to wage-loss and schedule award benefits would be terminated. The Office stated that no additional reasons for refusal would be accepted.

In response to the Office's June 8, 2005 letter, appellant submitted a June 20, 2005 report of an examination, EMG testing and nerve conduction studies of the upper and lower extremities from Dr. Kaufman; a report of a January 31, 2005 MRI scan of the lumbar spine; and a report of a January 31, 2005 MRI scan of the cervical spine.

[1] Dr. Bloom's restrictions included lifting no more than 20 pounds; being allowed to sit or stand as necessary; and no twisting, bending, stooping or kneeling.

By decision dated June 29, 2005, the Office terminated appellant's wage-loss and schedule award benefits, effective that date, on the grounds that he had refused an offer of suitable work. It did not address the medical evidence submitted subsequent to its June 8, 2005 letter.

On July 17, 2005 appellant, through her attorney, requested an oral hearing. She submitted additional medical evidence, including reports from Dr. Burdine, Dr. Kaufman and Dr. Anthony Ioppolo, a Board-certified neurosurgeon.

At the April 9, 2007 hearing, appellant contended that she was unable to perform the functions required by the proposed medical support assistant job, and that the medical evidence submitted established her position. Her representative argued that the impartial medical examiner had not reviewed the January 31, 2005 MRI scan reports submitted following the Office's June 8, 2005 "15-day" letter. The hearing representative informed appellant and her representative that, in its June 29, 2005 decision, the Office had properly disregarded the medical evidence submitted following its "15-day letter" of June 8, 2005, stating: "Even if the medical evidence is convincing and overwhelming after [the June 8, 2005 letter] that initial 30-day period, the Office [is not required to consider] any additional medical evidence at that time."

By decision dated May 21, 2007, the Office hearing representative affirmed the June 29, 2005 decision terminating appellant's entitlement to compensation benefits, based on her refusal to accept an offer of suitable employment pursuant to 5 U.S.C. § 8106(c)(2) of the Federal Employees' Compensation Act. The representative found that the Office had followed all procedural requirements in terminating appellant's benefits. He stated that a review of the record established that Dr. Bloom had reviewed the January 31, 2005 MRI scan reports prior to submitting his report. The representative acknowledged that the Office had disregarded all medical evidence submitted after June 8, 2005.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[2] It has authority under section 8106(c)(2) of the Act to terminate compensation for any partially disabled employee who refuses or neglects to work after suitable work is offered.[3] To justify termination, the Office must show that the work offered was suitable, that the employee was informed of the consequences of her refusal to accept such employment and that she was allowed a reasonable period to accept or reject the position or submit evidence or reasons why the position is not suitable and cannot be accepted.[4]

[2] *Willa M. Frazier*, 55 ECAB 379 (2004); *see also Roberto Rodriguez*, 50 ECAB 124 (1998).

[3] 5 U.S.C. § 8106(c).

[4] *See Ronald M. Jones*, 52 ECAB 190, 191 (2000); *see also Maggie L. Moore*, 42 ECAB 484, 488 (1991), *reaff'd on recon.*, 43 ECAB 818, 824 (1992). *See also* 20 C.F.R. § 10.516 (the Office shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter the Office's finding of suitability).

Office regulations provide that, 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.[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]

Once the Office has demonstrated that the job offered is suitable, the burden shifts to the employee to show that his or her refusal to work is reasonable or justified.[7]

ANALYSIS

The Office terminated appellant's entitlement to compensation benefits, based on her refusal to accept an offer of suitable employment pursuant to 5 U.S.C. § 8106(c)(2) of the Act. The representative found that the Office had followed all procedural requirements in terminating appellant's benefits. The Board disagrees and finds that the Office did not properly determine that appellant refused an offer of suitable work.

On May 4, 2005 the Office notified appellant that it found the medical support assistant position to be suitable and properly advised her that she had 30 days to accept the offer or provide reasons why she believed the position was not suitable. When appellant did not accept the offer within the 30-day period, the Office advised appellant, by letter dated June 8, 2005, that she had failed to provide valid reasons for refusing to accept the limited-duty job and that, if she had not accepted the position and arranged for a report date within 15 days of the date of the letter, her entitlement to wage-loss and schedule award benefits would be terminated. The Office stated that no additional reasons for refusal would be accepted. It again advised appellant of the penalty provisions of section 8106(c)(2).

Appellant then submitted new medical evidence, including: a June 20, 2005 report of an examination, EMG testing and nerve conduction studies of the upper and lower extremities from Dr. Kaufman. Appellant also submitted a report of a January 31, 2005 MRI scan of the lumbar spine and a report of a January 31, 2005 MRI scan of the cervical spine. Although the new medical evidence was received by the Office prior to the issuance of the June 29, 2005 decision terminating appellant's benefits, the record demonstrates that the Office did not review it prior to rendering its decision. Further, the Board is unable to determine whether the hearing representative considered Dr. Kaufman's report in rendering his May 21, 2007 decision. In affirming the June 29, 2005 termination decision, the hearing representative acknowledged that the Office had disregarded all medical evidence submitted after June 8, 2005, and the May 21, 2007 decision does not contain a finding that the Office erred in so doing. The Board notes that, at the April 9, 2007 hearing, the hearing representative informed appellant and her representative

[5] *Rebecca L. Eckert*, 54 ECAB 183 (2002).

[6] 20 C.F.R. § 10.517. *See Kathy E. Murray*, 55 ECAB 288 (2004); *see also Ronald M. Jones, supra* note 4.

[7] *Id.*

that the Office had properly disregarded the medical evidence submitted following its "15-day letter" of June 8, 2005, and that, even if the medical evidence is convincing and overwhelming after the initial 30-day period, the Office is not required to consider any additional medical evidence at that time. Thus, the record strongly suggests that the hearing representative also did not consider Dr. Kaufman's report. The fact that he referred to reports by Dr. Kaufman in the course of his discussion of the medical evidence is not determinative, as the record contains other reports from Dr. Kaufman which were previously received and considered by the Office.

The hearing representative's decision also suggests that he did not review or consider the January 31, 2005 MRI scan reports. He stated that a review of the record indicated that Dr. Bloom had reviewed the reports prior to submitting his February 22, 2005 report. However, the Board notes that Dr. Bloom's report refers only to a January 30, 2004 MRI scan report. There is nothing in the May 21, 2007 decision, in the form of discussion, suggesting that the hearing representative reviewed or considered the January 31, 2005 MRI scan reports.

The Board finds that the Office acted improperly in not considering all of the medical evidence submitted by appellant before terminating appellant's compensation for refusing suitable work. The Office must review all evidence submitted by a claimant and received by the Office prior to issuance of its final decision.[8] Once the Office advises a claimant that his or her reasons for refusing an offered position are unacceptable and that he or she has 15 days to accept the position or have compensation terminated, the claimant submits further reasons and supporting evidence at his or her own risk. Nevertheless, the Office must consider the reasons and evidence and can then concurrently reject them as unacceptable and terminate compensation.[9] As the record does not establish that the Office has reviewed Dr. Kaufman's June 20, 2005 report or the January 31, 2005 MRI scan reports, the May 21, 2007 decision terminating appellant's wage-loss compensation on the grounds that she refused or neglected an offer of suitable work must be reversed.

CONCLUSION

As the Office failed to review all evidence submitted by appellant prior to issuance of its final decision, the Board finds that the Office improperly terminated appellant's compensation benefits effective May 21, 2007 on the grounds that she refused an offer of suitable work.

[8] *C.W. Hopkins*, 47 ECAB 725, 727 (1996); *William A. Couch*, 41 ECAB 548 (1990).

[9] *Kenneth R. Love*, 50 ECAB 193, 198 (1998); *Maggie L. Moore*, *supra* note 4.

ORDER

IT IS HEREBY ORDERED THAT the May 21, 2007 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 26, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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