United States Department of Labor
Employees' Compensation Appeals Board

T.C., Appellant	)	
and	)	**Docket No. 08-1522**
	)	**Issued: December 23, 2008**
U.S. POSTAL SERVICE, BARTLETT POST OFFICE, Memphis, TN, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On April 25, 2008 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated January 9, 2008 terminating compensation on the grounds that she refused an offer of suitable work. The Board also has jurisdiction over a March 14, 2008 decision denying her request for reconsideration. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2); and (2) whether the Office properly refused to reopen appellant's case for reconsideration under 5 U.S.C. § 8128.

FACTUAL HISTORY

On March 29, 2003 appellant, then a 47-year-old letter carrier, sustained a lumbar strain and emotional condition due to being attacked by a homeless man while delivering mail. The

Office accepted the claim for post-traumatic stress, a single major depressive disorder and panic disorder with agoraphobia. Appellant stopped work on August 6, 2003 and has not returned. On July 22, 2004 the Office placed her on the periodic rolls for temporary total disability.

By letter dated March 21, 2006, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions, to Dr. Randall J. Moskovitz, a Board-certified psychiatrist, for a second opinion examination. In a May 2, 2006 medical report, Dr. Moskovitz diagnosed chronic post-traumatic stress disorder in partial remission and recurrent moderate major depression. He concluded that appellant was capable of returning to work. However, Dr. Moskovitz opined that a return to work at the employing establishment would be difficult as a result of appellant's anger and frustration and residual symptoms of depression and post-traumatic stress disorder.

In a report dated July 25, 2006, Jean W. Guy, Ph.D., a clinical psychologist, disagreed with Dr. Moskovitz's conclusion that appellant was capable of working. She opined that psychological testing revealed that appellant remained totally disabled.

The Office found a conflict in the medical opinion evidence between Dr. Moskovitz and Dr. Guy as to whether appellant remained totally disabled due to her accepted emotional condition. By letter dated August 9, 2006, it referred appellant, together with a statement of accepted facts, the case record and a list of questions, to Dr. Joel A. Reisman, a Board-certified psychiatrist, for an impartial medical examination. In a report dated October 23, 2008, Dr. Reisman advised that appellant continued to have residuals of her accepted post-traumatic stress disorder but that she was capable of work. He found that she was capable of working a modified position at the employing establishment. Dr. Reisman noted appellant's post-traumatic stress disorder did not preclude her from returning to work at the employing establishment. However, he stated that "[t]he only reason she would not return to the other positions is her feelings regarding the perceived harassment she received from supervisors and fellow workers." Dr. Reisman noted that appellant's perceptions of harassment were not accepted by the Office as related to her accepted claim. He concluded that she was capable of work, noting her preference that she work at a post office other than the one where she was stationed. The only restrictions provided by Dr. Reisman were that appellant not work as a mail carrier and be assigned to a different post office.

On July 27, 2007 the employing establishment offered appellant a full-time modified position located at the cross town carrier station. The position required casing mail, distributing mail to the carriers, answering the telephone, revising edit sheets on routes as required, writing-up and distribution accountable mail, assisting customers with package pick-ups and complaints, and other duties assisting carriers with the mail. Appellant declined the job offer on August 2, 2007.

In a letter dated August 28, 2007, the Office advised appellant that a modified position was available and that she had 30 days to either accept the position or provide an explanation for refusing it. It found that the position was based on Dr. Reisman's October 23, 2006 report. The Office advised appellant that the position was found to be within the restrictions set by Dr. Reisman and that her compensation could be terminated based on her refusal to accept a suitable position pursuant to 5 U.S.C. § 8106(c)(2).

In a letter dated September 17, 2007, appellant again declined the position. She contended that her treating physician found her disabled from returning to any position at the employing establishment.

On October 1, 2007 the Office received a September 10, 2007 report of Dr. Juan Jaramillo and Mark Hesselrode, APN, stating that appellant had not been released to return to work at the employing establishment. They noted that appellant's condition remained brittle and a successful return to the workplace could not be reasonably anticipated.

On October 4, 2007 the Office advised appellant that her reasons for refusing the offered position were not valid. Appellant was given 15 days to accept the position.

In an October 17, 2007 report, Dr. Jaramillo referenced the September 10, 2007 report which found appellant disabled from returning to work at the employing establishment. He advised that appellant was being treated for post-traumatic stress disorder and any return to work at the employing establishment was "against medical advice."

In a letter dated October 30, 2007, the Office again advised appellant that a modified position was available and that she had 30 days to either accept the position or provide an explanation for refusing it. It advised appellant that the position was found to be within the restrictions noted by the impartial medical examiner, Dr. Reisman. The Office informed appellant that her compensation could be terminated based on her refusal to accept a suitable position pursuant to 5 U.S.C. § 8106(c)(2).

In a November 24, 2007 letter, appellant again declined the position based upon her physician's advice.

On December 11, 2007 the Office advised appellant that her reasons for refusing the offered position were not valid. Appellant was given 15 days to accept the position.

In a letter dated December 16, 2007, appellant's representative contended the position was not suitable as her treating physician had not released her to return to work at the employing establishment.

In a January 9, 2008 decision, the Office terminated appellant's wage-loss compensation effective that date on the grounds that she refused an offer of suitable work.

On February 29, 2008 appellant requested reconsideration. She submitted the September 10 and October 17, 2007 reports of Dr. Jaramillo and a letter from her representative dated December 16, 2007.

By decision dated March 14, 2008, the Office denied appellant's reconsideration request on the grounds that it neither raised substantive legal questions, nor included new and relevant evidence sufficient to require the Office to review its prior decision.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[1] Under section 8106(c)(2) of the Federal Employees' Compensation Act, the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[2] To justify termination, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[3] 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.[4]

Office regulations provide that, in determining what constitutes suitable work for a particular disabled employee, the Office should consider 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] It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.[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 the 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).[9]

---

[1] *A.W.*, 59 ECAB ___ (Docket No. 08-306, issued July 1, 2008).

[2] 5 U.S.C. § 8106(c)(2); *see also Mary E. Woodard*, 57 ECAB 211 (2005); *Geraldine Foster*, 54 ECAB 435 (2003).

[3] *T.S.*, 59 ECAB ___ (Docket No. 07-1686, issued April 24, 2008); *Ronald M. Jones*, 52 ECAB 190 (2000).

[4] *Richard P. Cortes*, 56 ECAB 200 (2004); *Joan F. Burke*, 54 ECAB 406 (2003).

[5] 20 C.F.R. § 10.500(b).

[6] *Richard P. Cortes*, *supra* note 4.

[7] *Id.*; *Bryant F. Blackmon*, 56 ECAB 752 (2005).

[8] *See Connie Johns*, 44 ECAB 560 (1993).

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

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.[10]

Section 10.516 of the Code of Federal Regulations states that the Office will advise the employee that the work offered is suitable and provide 30 days for the employee to accept the job or present any reasons to counter the Office's finding of suitability.[11] Thus, before terminating compensation, the Office must review the employee's proffered reasons for refusing or neglecting to work.[12] If the employee presents such reasons and the Office finds them unreasonable, the Office will offer the employee an additional 15 days to accept the job without penalty.[13]

ANALYSIS -- ISSUE 1

Appellant's claim was accepted by the Office for an emotional condition arising from the March 29, 2003 injury.

The Office properly found that a conflict in medical opinion arose between Dr. Moskovitz, an Office referral physician, and Dr. Guy, an attending clinical psychologist, as to whether appellant remained totally disabled due to her accepted emotional condition. Dr. Moskovitz opined that appellant was capable of working with restrictions. Dr. Guy opined that appellant was totally disabled due to her psychiatric condition.

The Office referred appellant to Dr. Reisman, selected as the impartial medical specialist. In an October 23, 2006 report, Dr. Reisman advised that appellant had residuals of the accepted March 29, 2003 injury. He reviewed her medical records and found her depressive disorder was in partial remission. Dr. Reisman found that her residuals were impairing but not totally disabling. He opined that appellant could not resume her regular duties as a letter carrier or return to her date-of-injury workplace; however, she was not totally disabled. Dr. Reisman advised that she was capable of working full time provided she was assigned to another post office and not required to be a mail carrier at the same or other routes. However, appellant could work at other positions. Dr. Reisman noted her perceptions of harassment which were not substantiated by the record or accepted by the Office. As appellant's feelings of harassment were unsubstantiated and not accepted by the Office, he concluded that she was capable of working at the employing establishment. Dr. Reisman noted that appellant related that she felt less stress by going to a post office other than the one at which she had been stationed. The only restrictions he recommended were that she not work as a mail carrier and be assigned to a different post office.

---

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (July 1997).

[11] 20 C.F.R. § 10.516; *see T.S.*, *supra* note 3.

[12] *See Sandra K. Cummings*, 54 ECAB 493 (2003); *see also Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992) and 20 C.F.R. § 10.516 which codifies the procedures set forth in *Moore.*

[13] *Melvin James*, 55 ECAB 406 (2004).

The Board finds that Dr. Reisman's impartial opinion is based on a proper factual and medical background and is entitled to special weight. He found that, although appellant had residuals of her accepted post-traumatic stress disorder, she was capable of returning to work. Dr. Reisman's report constitutes the special weight of the medical opinion evidence afforded an impartial medical specialist.

Based on the work restrictions provided by Dr. Reisman, the employing establishment offered appellant modified duty at a location other than her original work station. The position did not require carrying mail on a route. It required casing mail, distributing mail to the carriers, answering the telephone, revising edit sheets on routes as required, writing-up and distribution accountable mail, assisting customers with package pick-ups and complaints, and other duties assisting carriers with the mail. The job description stated that appellant would work within the restrictions set by Dr. Reisman. The Board finds that the Office met its burden of proof to establish that the position offered appellant on July 27, 2007 was suitable work within her physical restrictions.[14]

In an August 28, 2007 letter, the Office notified appellant that the modified rural carrier position was suitable to her physical limitations and of the consequences for not accepting a suitable job offer pursuant to section 8106(c). In response, appellant submitted a September 10, 2007 report from Dr. Jaramillo who noted that she remained totally disabled and unable to return to the workplace. Dr. Jaramillo did not provide any history of injury or rationale explaining why appellant remained totally disabled and unable to perform the duties of the offered position. The Board has held that medical opinions unsupported by rationale are of diminished probative value.[15] As Dr. Jaramillo provide no medical rationale in support of his opinion, his report is of diminished probative value and insufficient to create a conflict in the medical evidence or otherwise disturb the special weight of the medical evidence accorded the opinion of Dr. Reisman.

The Board further finds that the Office complied with its procedural requirements in advising appellant that the position was suitable, providing her with the opportunity to accept the position or provide reasons for refusing the job offer, and in notifying her of the penalty provision of section 8106(c).[16] In letters dated August 28 and October 30, 2007, the Office notified appellant that the modified rural carrier position was suitable to her physical limitations and of the consequences for not accepting a suitable job offer pursuant to section 8106(c). It confirmed that the position remained available. After appellant refused the offered position the second time on November 24, 2007, the Office advised her in a December 11, 2007 letter that her reasons for refusing the job offer was not valid. It provided her with 15 days to accept the offered position without penalty. Appellant's representative reiterated her contention that she was medically precluded from accepting the position. The Office terminated her compensation benefits by decision issued on January 9, 2008.

[14] *Bryant F. Blackmon*, *supra* note 7.

[15] *S.S.*, 59 ECAB ___ (Docket No. 07-579, issued January 14, 2008).

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

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits on January 9, 2008 as she had refused an offer of suitable work.

LEGAL PRECEDENT -- ISSUE 2

The Act[17] provides that the Office may review an award for or against payment of compensation at any time on its own motion or upon application.[18] The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.[19] The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[20]

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[21]

ANALYSIS -- ISSUE 2

In a February 29, 2008 letter, appellant requested reconsideration of her claim. She reiterated her contention that she remained disabled from performing the offered position. Appellant resubmitted reports dated September 10 and October 17, 2007 from Dr. Jaramillo. The submission of the reports of Dr. Jaramillo did not require reopening of appellant's claim for further merit review as she previously submitted these reports in support of her contention. The Office has already considered this evidence and it does not constitute a basis for reopening the case on the merits.[22]

Appellant has not submitted any relevant and pertinent new evidence, advanced a legal argument not previously considered by the Office, nor argued that the Office erroneously

[17] 5 U.S.C. § 8101 *et seq.*

[18] 5 U.S.C. § 8128(a). *See Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

[19] 20 C.F.R. § 10.605.

[20] 20 C.F.R. § 10.606. *See Susan A. Filkins*, 57 ECAB 630 (2006).

[21] 20 C.F.R. §10.608(b). *See Candace A. Karkoff*, 56 ECAB 622 (2005).

[22] *L.H.*, 59 ECAB ___ (Docket No. 07-1191, issued December 10, 2007) (the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case).

interpreted a specific point of law. Thus, she has not met the criteria to have the Office reopen her case for review on the merits.[23]

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation benefits effective January 9, 2008 on the grounds that she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2). The Board further finds that the Office properly denied appellant's request for reconsideration of the merits of her case.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 14 and January 9, 2008 are affirmed.

Issued: December 23, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

[23] *M.E.*, 58 ECAB ___ (Docket No. 07-1189, issued September 20, 2007) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits).