

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

E.Y., Appellant

and

**U.S. POSTAL SERVICE, GENERAL MAIL
FACILITY, San Antonio, TX, Employer**

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**Docket No. 07-769
Issued: February 8, 2008**

Appearances:
James R. Linehan, Esq., for the appellant
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 January 25, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' November 15, 2006 merit decision affirming the termination of her compensation benefits for failure to accept suitable employment. 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 on the grounds that she refused to accept suitable work.

FACTUAL HISTORY

On December 11, 1999 appellant, then a 36-year-old mail processor, sustained injury to her right elbow while "pulling trays of mail off of racks and loading into postcons." On January 21, 2000 the Office accepted her claim for right elbow epicondylitis and right shoulder strain. Appellant's claim was later accepted for bilateral shoulder sprains and upper arm and wrist strains. The Office paid appropriate compensation and medical benefits.

Appellant returned to work on August 11, 2000 in a full-time position with modified duties. She stopped working again on January 9, 2001 and remained off work until February 11, 2002. Appellant returned to work in a modified position until March 9, 2003. Dr. Nicolas Walsh, a Board-certified psychiatrist, took her off work because the employing establishment had not provided her with an ergonomic chair. Appellant returned to work on July 12, 2003 and worked until July 22, 2003, when she again stopped work.

In a consultation note dated August 29, 2003, Dr. Salvador Baylan, a Board-certified psychiatrist, listed his impressions as cumulative trauma disorder (carpal tunnel syndrome, cubital tunnel syndrome and radial tunnel syndrome); myofascial pain syndrome; possible peripheral neuropathy, lateral epicondylitis, rule out cervical disc disease and reactive depression. On September 29, 2003 he noted that a review of appellant's records revealed problems involving her shoulders, elbow, low back pain, depression and fibromyalgia. Dr. Baylan stated that appellant's most prominent problem was myofascial pain syndrome and fibromyalgia. He recommended an exercise program and that she stay away from stressful situations that could aggravate her fibromyalgia.

On October 9, 2003 Dr. Walsh advised that he would no longer see workers' compensation patients. He referred appellant to Dr. Baylan.

In a letter dated December 17, 2003, the employing establishment notified the Office of a proposed modified mail handler assignment. The duties required working at a table riffling mail for 2 to 3 hours, collecting run reports for 30 minutes, checking employee badges at entrances for 2 hours, relief of guard shack for 30 minutes and other duties assigned within medical restrictions for 2 hours. The physical requirements of the modified position were sitting and facing mail (self-paced) for 2 to 3 hours, collecting reports and walking to collect damaged mail for 30 minutes and visual observation use of radio/telephone as needed for 2 hours. It was noted that all duties are self-paced and that an ergonomic chair was bought and would be provided for appellant's personal usage.

In a medical report dated January 15, 2004, Dr. Baylan found that appellant continued to demonstrate signs and symptoms of myofascial pain syndrome and fibromyalgia pain syndrome with persistent depression. Appellant had features of cumulative trauma disorder with no evidence of frank carpal tunnel syndrome based on her last nerve conduction velocity study. Her condition prevented her from performing many of her usual and customary activities. Dr. Baylan noted that her condition warranted conservative intervention, *i.e.*, trigger point injections and myofascial release techniques as well as continued psychiatric care and medications.

By letter dated December 12, 2003, the Office referred appellant to Dr. Govindasamy Durairaj, a Board-certified orthopedic surgeon, for a second opinion. In a report dated February 5, 2004, he listed his impression as right bicipital tendinitis and lateral epicondylitis. Dr. Durairaj noted that appellant had objective signs indicating shoulder and elbow conditions which are currently active and disabling.

Appellant retired on January 20, 2004.

In a January 30, 2004 report, Dr. Kenneth L. Matthews, a psychiatrist, diagnosed a depressive disorder, generalized anxiety disorder and post-traumatic stress disorder.

On February 9, 2004 the Office referred appellant for a functional capacity evaluation. On March 1, 2004 the physical therapist indicated that appellant did not meet the return to work requirements of her previous job. He noted that appellant's return to work lifting requirement was 50 pounds and that her maximum lift was 17.5 pounds, which correlated with a restricted right shoulder range of motion. The physical therapist noted that appellant's shoulder/elbow strength was near normal. He recommended that alternate duty at a lower performance level be considered.

In a letter dated March 25, 2004, Dr. Durairaj advised that appellant could return to restricted duty for eight hours a day. In a work capacity evaluation completed on March 30, 2004, he noted that appellant could reach for zero to two hours, was limited to two to four hours of repetitive movements in her wrists and elbows and pushing, pulling and lifting was limited to two to four hours and 20 pounds.

By letter dated April 15, 2004, the Office forwarded a copy of the functional capacity evaluation and Dr. Durairaj's reports to Dr. Baylan. In a May 20, 2004 letter, Dr. Baylan responded:

"I reviewed the evaluation of Dr. Durairaj and the completed [duty status report]. I concur with the assessment partly because other complicating conditions stemming from the original injury were not mentioned or presumably inadvertently left out. Dr. Walsh had noted earlier in the course of her evaluation and treatment documented the presence of depression, anxiety, myofascial pain syndrome and neuropathic pain syndrome. These conditions have contributed to her chronic pain syndrome. These aforementioned conditions can have a direct influence on her ability to work and maintain work. Please note, these conditions are not static, and her pain and functional capacity will vary from day to day impacting her job performance.

"I agree with the completed [work capacity evaluation]. I also agree with the mismatch between her job demand and the functional capacity as determined by the [functional capacity evaluation.]. I question her ability to maintain employment with restrictions considering that her depression is still unresolved."

On May 27, 2004 Dr. Baylan stated that appellant's problem "was essentially chronic pain syndrome involving the upper part of her body, neck, arm and associated fibromyalgia, myofascial pain syndrome, depression and neuropathic pain. He noted that all of the aforementioned conditions have precluded her from working and that she was now disabled.

On July 16, 2004 the employing establishment extended a modified mail handler job offer to appellant. The position was in accordance with the restrictions set by Dr. Durairaj. The position did not require appellant to exceed 20 pounds lifting and an ergonomic chair would be provided. The employing establishment listed the duties of the modified position as working at a table riffling mail (self-paced) for two to four hours, collecting run reports from machines from

one to two hours, relief for monitoring station one to two hours and additional duties within restrictions as assigned by supervisor for one to two hours. The physical requirements involved sitting and facing mail, walking several feet to collect reports and damaged mail not to exceed 20 pounds. It was noted that an ergonomic chair would be provided.

By letter dated July 20, 2004, the Office notified appellant that the employing establishment had offered her a position as a modified light-duty mail handler. It found the position to be within her physical limitations and confirmed that the position remained available. The Office informed appellant that, if she failed to accept this position or demonstrate why her failure to accept it was justified, her right to compensation would be terminated in keeping with 5 U.S.C. § 8106(c).

By letter dated August 8, 2004, received by the Office on August 13, 2004, appellant requested a change in treating physicians. She made no response with regard to the job offer. Appellant did not respond to the Office's letter of July 20, 2004 within the requisite 30-day period.

By decision dated August 26, 2004, the Office terminated appellant's compensation benefits as she did not accept a suitable position. The Office noted that she did not provide any reasons for refusing the position. The employing establishment verified on August 20, 2004 that the offered position continued to remain available to appellant.

On September 15, 2004 appellant requested an oral hearing. By letter dated November 18, 2004, the Office informed her of various hearing procedures and that she could have a representative at the hearing.

In a report dated October 19, 2004, Dr. Alan W. Young, an osteopath, reviewed appellant's work and medical history. He listed his impressions as bilateral cubital and carpal tunnel syndrome; right shoulder strain and chronic myofascial pain; and significant depression. Dr. Young prescribed acupuncture.

At the hearing held on July 26, 2005 appellant described how her injury occurred. She contended that she did not refuse suitable employment because she filed for disability retirement as she was instructed to do by the Office.

In an October 10, 2005 report, a physician's assistant in the office of Dr. Donald Bacon, a Board-certified anesthesiologist, assessed appellant with arm pain and traumatic injury to shoulder and upper arm. He noted that appellant continued to demonstrate evidence of ongoing neck pain. The physician's assistant stated that it was his opinion that her mood had been impaired due to pain and physical dysfunction.

By decision dated October 27, 2005, the hearing representative affirmed the August 26, 2004 termination of benefits.

Appellant submitted further medical reports by Dr. Bacon dated from February 22 through August 23, 2006. Dr. Bacon treated her for adhesive capsulitis of shoulder, arm pain, cervical strain and lateral and medial epicondylitis and provided multiple epidural steroid injections. Dr. Bacon noted that appellant's mood was impaired by her physical ailments.

On October 25, 2006 appellant, through her attorney, requested reconsideration. Counsel submitted a copy of a decision of the Social Security Administration finding her disabled commencing July 1, 2003 and continuing for at least 12 months with severe impairments of bilateral carpal tunnel syndrome and major depressive disorder. Medical reports addressing appellant's emotional condition dated from October 10, 2001 through September 24, 2003 indicated that she was treated for a major depressive disorder. On July 7, 2003 Dr. Megaly V. Marrero, a clinical psychologist, noted that appellant's diagnosis of major depressive disorder would significantly impact her ability to perform her job. She found that appellant could not perform her job duties as a mail clerk, noting that she would have difficulty with repetitive motion and that her pain increased her difficulties in concentrating.

By decision dated November 15, 2006, the Office denied modification of the October 27, 2005 decision.

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for him is not entitled to compensation.¹ The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.² In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.³

The implementing regulations 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.⁴ To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.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

¹ 5 U.S.C. § 8106(c)(2).

² *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

³ *Glen L. Sinclair*, 36 ECAB 664 (1985).

⁴ 20 C.F.R. § 10.517(a) (1999); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(5) (July 1997).

⁵ *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

medical evidence.⁶ 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.⁷ 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). 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.⁸

ANALYSIS

The Office properly found that the modified job offer was suitable. Dr. Durairaj listed appellant's restrictions in his work capacity evaluation as reaching for zero to two hours, two to four hours of repetitive movements with her wrists and elbows and pushing, pulling and lifting limited to two to four hours and 20 pounds. Dr. Baylan, appellant's treating physician, agreed with these limitations. The employing establishment indicated that it would not exceed the restrictions set forth in Dr. Durairaj's March 30, 2004 report. The position did not require appellant to exceed 20 pounds lifting and an ergonomic chair would be provided. Appellant's work would be self-paced which would allow her to stay within her restrictions. There is no medical evidence of record to establish that the modified job offer was outside appellant's restrictions. The Board notes that Dr. Bacon merely discusses his treatment of appellant, not her ability to perform the modified job offer.

On appeal appellant's attorney correctly indicates that, if a medical condition has arisen since the compensable injury and the condition disables the employee, the job will be unsuitable.⁹ However, there was no medical evidence that appellant's emotional condition caused her to be disabled from performing the modified position. Although Dr. Marrero expressed some concerns with regard to appellant's abilities to perform her usual job, she did not address appellant's capacity to perform the modified job assignment.

Appellant also submitted a decision from the Social Security Administration. However, the findings of other administrative agencies are not determinative of appellant's disability under the Federal Employees' Compensation Act.¹⁰ The Social Security Act the Federal Employees'

⁶ See *Marilyn D. Polk*, 44 ECAB 673 (1993).

⁷ See *Connie Johns*, 44 ECAB 560 (1993).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (July 1997).

⁹ See *Connie Johns*, *supra* note 7.

¹⁰ *Daniel Deparini*, 44 ECAB 657, 660 (1993).

Compensation Act have different standards of medical proof on the question of disability.¹¹ Thus, this evidence is not relevant with regard to appellant's claim under the Federal Employees' Compensation Act.

Appellant contends that the Office failed to give her proper notice of the proposed termination of benefits for failure to accept suitable employment. By letter dated July 20, 2004, the Office informed her of the modified light-duty position offered by the employing establishment, noted that it reviewed the job offer and found it suitable and in accordance with the medical limitations provided by Dr. Durairaj and that appellant's physician, Dr. Baylan, agreed with the limitations set by Dr. Durairaj. In this letter, the Office informed appellant of the consequences of her failure to accept suitable employment and notified her that, if she failed to accept the position, she must provide a written explanation of reasons within 30 days. She did not respond within 30 days and the Office terminated compensation benefits. Accordingly, the Office properly notified appellant of the modified position offer and of the consequences of her failure to accept the position without a valid reason and appellant failed to respond within 30 days with reasons for refusing the position, the Office properly terminated benefits.

Appellant contends that the Office erroneously placed the burden of proof on her when terminating benefits. This argument is without merit. In terminating appellant's compensation on August 26, 2004, the Office had the burden of proof to establish that the employing establishment made an offer of suitable employment. The Office met its burden of proof to terminate her compensation based on her refusal of suitable work. The burden then shifted to appellant to show that her refusal to work in that position was justified.¹²

Finally, counsel's contention that the Office failed to notify appellant of her right to representation at the hearing is without merit. In the attachment to its November 18, 2004 letter with regard to appellant's hearing rights, the Office clearly advised that she could be represented by another person at the hearing. There is no requirement that the hearing representative again notify appellant of this right immediately prior to the hearing.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation benefits on the grounds that she refused to accept suitable work.

¹¹ *Id.*

¹² See *Ronald M. Jones*, 52 ECAB 190 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 15, 2006 is affirmed.

Issued: February 8, 2008
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