United States Department of Labor
Employees' Compensation Appeals Board

J.A., Appellant	)	
and	)	**Docket No. 07-871**
	)	**Issued: February 11, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Billings, MT, Employer	)	

Appearances:
John S. Evangelisti, 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 February 11, 2007 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated November 8, 2006, in which a hearing representative affirmed the termination of her monetary compensation based on her refusal of suitable work and finalized a prior denial of appellant's request for subpoenas. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation on the grounds that she refused an offer of suitable work; and (2) whether the Office properly denied her request to subpoena witnesses and documents.

FACTUAL HISTORY

On July 7, 2000 appellant, then a 43-year-old clerk, filed an occupational disease claim for a hip condition. The Office accepted the claim for left contusion of hip resolved on June 28, 2000 and later expanded her claim to include hip fracture and authorized a left total hip

replacement which was performed in May 2001. Appellant worked limited duty commencing July 7, 2000 and elected disability retirement on March 2, 2004.[1]

Appellant sought treatment from Dr. Joseph M. Erpelding, a Board-certified orthopedist, who noted a history of her work injuries starting in 1985 when she had a stress fracture of the left femoral neck that required a total hip replacement in 1993. In reports dated February 7 and March 19, 2001, Dr. Erpelding advised that x-rays demonstrated additional significant osteolysis in the weight bearing dome of the acetabulum and recommended a revision of appellant's left hip. On April 16, 2001 the Office denied appellant's surgery request. Appellant requested a hearing and submitted a May 1, 2001 operative report from Dr. Erpelding dated May 1, 2001, who performed a revision of the left total hip. In reports dated May 21, 2001 to August 21, 2002, Dr. Erpelding opined that the primary cause of appellant's accelerated wear of her left hip since 1989 was her work duties. On June 17, 2002 a hearing representative set aside the April 16, 2001 decision, found that the evidence established that appellant had a work-related left hip fracture and directed appellant's referral for a second opinion physician to determine if the May 1, 2001 hip surgery was medically necessary. Thereafter, Dr. Erpelding submitted reports indicating that appellant had a stress reaction around her femoral component of the left hip that would require revision. On January 6, 2003 he performed a left hip revision. In an October 15, 2003 report, Dr. Erpelding stated that appellant was reaching maximum medical improvement and had 50 percent permanent impairment of the left leg.[2]

On November 11, 2003 the Office referred appellant for a second opinion to Dr. Dean C. Sukin, a Board-certified orthopedic surgeon, to determine if appellant had residuals of her work-related condition. In a November 21, 2003 report, Dr. Sukin noted reviewing appellant's history and listing examination findings. He diagnosed fracture of the left femoral neck, left hemiarthroplasty, left total hip arthroplasty and left osteolysis requiring revision to current total hip arthroplasty. Dr. Sukin opined that appellant would not reach maximum medical improvement until January 2004 and still had her work injury. He opined that appellant could work eight hours per day subject to various restrictions.

On January 30, 2004 appellant was referred for vocational rehabilitation. On February 13, 2004 the employing establishment offered appellant a full-time limited-duty position as a modified mail processing clerk effective February 17, 2004 with a tour of duty from 3:30 p.m. to 12:00 a.m. and an annual salary of $43,664.00. The position complied with the restrictions set forth by Dr. Sukin, the Office referral physician. In a note dated March 2, 2004, Dr. Erpelding advised that appellant could not perform the job duties in the February 13, 2004 job offer because the position would require pushing, pulling of less than 20 pounds, sitting,

[1] On May 13, 1985 appellant filed a claim for a left hip injury which was accepted for enthesopathy of the hip, resolved, File No. 14-0272875. On February 18, 1994 she filed a claim for a back injury, which was accepted by the Office for contusion of the back, File No. 14-00291469, which is closed. On February 25, 2000 appellant filed a claim for a left hip injury that occurred when she slipped and fell at work which the Office accepted for left hip and thigh contusion, File No. 12-0192399. On May 10, 2002 she filed a claim for a left hip injury that occurred when she was struck by a container and which the Office accepted for left contusion of the lower leg, left sprain/strain of the knee and leg, File No. 12-2009123.

[2] On February 26, 2004 appellant filed a claim for a schedule award. Dr. Erpelding continued to recommend 50 percent impairment of the left leg.

standing and walking. On May 11, 2004 appellant refused the job offer. She submitted a June 8, 2004 report from Dr. Erpelding, who noted disagreeing with Dr. Sukin's opinion that she could perform the offered position.

On June 21, 2004 the Office found that a conflict of medical opinion existed between Dr. Erpelding, who indicated that appellant was unable to return to the offered position and Dr. Sukin, an Office referral physician, who determined that appellant had residuals of her accepted conditions but could work full time subject to restrictions.

To resolve the conflict the Office referred appellant to Dr. B. Max Iverson, a Board-certified orthopedic surgeon, who indicated, in a report dated July 21, 2004, that he reviewed her history and listed examination findings. Dr. Iverson diagnosed status post revision of multiple failed surgical procedures of the left hip, status post total hip replacement revision femoral and acetabular aspects, leg length discrepancy, irregular and disfiguring scarring with lateral hip incisions and persistent pain of the left hip secondary to scarring and multiple surgical procedures. He indicated that appellant reached maximum medical improvement but continued to have residuals relating to her work-related injuries and opined that appellant's residuals were a consequence of problems related to a fracture that occurred at work in 1988. In a July 21, 2004 work capacity evaluation, Dr. Iverson advised that appellant could work 4 to 6 hours per day, with no twisting, bending/stooping, operating a motor vehicle, squatting, kneeling or climbing, sitting limited to 3 to 4 hours, walking limited to 30 minutes, standing limited to 1 to 2 hours, reaching and reaching above the shoulder limited to 30 minutes, pushing, pulling and lifting limited to 30 minutes and 10 pounds, with 15-minute breaks every 2 hours and appellant may use cane, crutches and walker as needed.

On September 7, 2004 the employing establishment offered appellant a part-time, six-hour-per-day, limited-duty position as a modified mail processing clerk effective September 8, 2004 with a tour of duty from 3:30 p.m. to 9:30 p.m. and an annual salary of $43,872.00. The offer noted that appellant would work six hours per day in conformance with Dr. Iverson's restrictions. The duties included modified casing of manual letters with 15-minute breaks every 2 hours, may use cane, crutches and walker as needed. The physical requirements of the position included no lifting, pushing, pulling more than 10 pounds intermittently, no twisting, bending, stooping, squatting, kneeling or climbing, sitting for 3 to 4 hours, walking no more than 30 minutes, standing no more than 1 to 2 hours and no reaching above the shoulder more than 30 minutes.

In an October 25, 2004 letter, the Office advised appellant that the job offer constituted suitable work. She was informed that she had 30 days to accept the position or provide reasons for refusing it; otherwise, she risked termination of her compensation benefits.

In a letter dated October 26, 2004, appellant rejected the job offer and asserted that the job requirements exceeded the restrictions set forth by Dr. Iverson.[3]

[3] Appellant submitted a November 17, 2004 report from Dr. Erpelding who opined that appellant had 50 percent impairment of the left leg. On December 28, 2004 the Office granted appellant a schedule award for 50 percent impairment of the left leg. The period of the award was from March 21, 2004 to December 23, 2006.

On December 2, 2004 the Office advised appellant that the position of a modified mail processing clerk was suitable work. The Office noted that it considered the reasons given by her for refusing the position and found them to be unacceptable. The Office afforded appellant 15 additional days to accept the job offer.

Appellant submitted letters dated December 9 to 14, 2004 and advised that she was rejecting the job offer because it exceeded the restrictions set forth by Dr. Iverson, specifically that she could only work four to six hours per day.

In a decision dated December 28, 2004, the Office terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work.

By letter dated January 25, 2005, appellant requested an oral hearing. She submitted a May 24, 2005 report from Dr. Erpelding who diagnosed a stable hip revision.

In a decision dated May 2, 2005, the hearing representative reversed the Office decision dated December 28, 2004 and remanded the case for further medical development. The Office instructed the Office to send the September 7, 2004 job offer to Dr. Iverson to obtain an opinion on whether appellant could perform the position six hours per day.

On May 25, 2005 the Office asked that Dr. Iverson review the September 7, 2004 job offer and advise whether appellant could perform the position for six hours daily. In a May 26, 2005 report, Dr. Iverson indicated that he reviewed the job description which outlined a 6-hour workday with mainly sitting activities where appellant could move around for 30 minutes during the day and opined that she more likely than not could perform these duties 6 hours per day. He indicated that the lifting, pushing, pulling and bending restrictions remained in effect.

On August 24, 2005 appellant was referred for vocational rehabilitation. In correspondence dated August 25, 2005, she notified the Office that she moved to Miles City, Montana.

On September 20, 2005 the employing establishment offered appellant a part-time, six-hour-per-day, limited-duty position as a modified mail processing clerk effective September 20, 2005 with a tour of duty from 3:30 p.m. to 9:30 p.m. and an annual salary of $45,997.00. The offer noted that appellant would work six hours per day in conformance with Dr. Iverson's restrictions. The duties included computerized forwarding system reworking of waste mail up to four hours per day, manual casing in modified case up to four hours per day, switchboard relief up to five hours per day and applying code and labels up to two hours per day. Physical requirements included lifting, pushing, pulling up to 10 pounds no more than 30 minutes per day, no twisting, bending, stooping, squatting, kneeling or climbing, sitting for 3 to 4 hours per day, walking no more than 30 minutes, standing no more than 1 to 2 hours, no reaching above the shoulder more than 30 minutes with a wheelchair available as needed. The job was subject to Dr. Iverson's limitations.

In a November 2, 2005 letter, the Office advised appellant that the job offer constituted suitable work. She was informed that she had 30 days to accept the position or provide reasons for refusing it; otherwise, she risked termination of her compensation benefits.

In a letter dated November 23, 2005, appellant rejected the position. She advised that there were issues in her claim that had not been addressed and indicated that she moved 150 miles away to Miles City, Montana.

On February 15, 2006 the Office advised appellant that the position of a modified mail processing clerk was suitable work. The Office noted that it considered the reasons given by her for refusing the position and found them to be unacceptable. The Office afforded appellant 15 additional days to accept the job offer.

In a decision dated March 8, 2006, the Office terminated appellant's monetary compensation effective March 19, 2006 because she refused an offer of suitable work.

On April 3, 2006 appellant requested an oral hearing which was held on August 22, 2006. She submitted a report from Dr. Iverson dated July 27, 2006 and reported that her symptoms had worsened in the past two years and advised that she could not work for six hours per day as her employer required. Dr. Iverson indicated that it appeared that appellant was unable to work a regular six-hour day and would more likely than not be confined to a part-time work involving four hours per day.

In a report dated May 2, 2006, the rehabilitation counselor closed her case file.

On May 31, 2006 appellant requested subpoenas for Dr. Erpelding and Dr. Iverson to attend the oral hearing. She advised that the documentation produced by Drs. Iverson and Erpelding has been misinterpreted and asserted that subpoenas would be the only method to obtain a complete and accurate assessment of the reports previously submitted.

In a July 6, 2006 decision, the Office denied the subpoena request finding that appellant had failed to explain why a subpoena was the best way to obtain such evidence and that there was no other means to obtain the documents or testimony.

In a decision dated November 8, 2006, the hearing representative affirmed the Office decision dated March 8, 2006.

LEGAL PRECEDENT -- ISSUE 1

Section 8106(c)(2) of the 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.[4] 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.[5] In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2),

[4] 5 U.S.C. § 8106(c)(2).

[5] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

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.[6]

The implementing regulations provide 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]

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.[9] 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.[10] 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.[11] Lastly, if the employee is required to move to a certain area, isolated or otherwise, because of health conditions which were caused by the injury or which predated it, the issue of availability must be considered with respect to the new area of residence.[12]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a left hip and thigh contusion, left contusion of the lower leg, left sprain/strain of the knee and left hip fracture and authorized a left total hip replacement which was performed in May 2001. The Office terminated appellant's

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[6] *Glen L. Sinclair*, 36 ECAB 664 (1985).

[7] 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).

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

[9] *See Marilyn D. Polk*, 44 ECAB 673 (1993).

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

[11] *Supra* note 7, Chapter 2.814.4(b)(4) (July 1997).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b) (July 1997); *see Edward J. Stabell*, 49 ECAB 566 (1998).

compensation effective March 8, 2006 based on appellant's refusal of suitable work. The Board finds that the Office established that the offered position of September 20, 2005 was suitable.

The Office reviewed the medical evidence and determined that a conflict in medical opinion existed between appellant's attending physician, Dr. Erpelding, a Board-certified orthopedist, and the Office referral physician, Dr. Sukin, a Board-certified orthopedist, regarding whether appellant's accepted conditions had resolved and whether she was totally disabled.[13] Thus, the Office properly referred appellant to Dr. Iverson to resolve the conflict.

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.[14]

In his July 21, 2004 report, Dr. Iverson indicated that he reviewed the entire case record and statement of accepted facts. He examined appellant thoroughly and related his clinical findings. Dr. Iverson diagnosed status post revision of multiple failed surgical procedures of the left hip, status post total hip replacement revision femoral and acetabular aspects, leg length discrepancy, irregular and disfiguring scarring with lateral hip incisions and persistent pain of the left hip secondary to scarring and multiple surgical procedures. He indicated that appellant continued to have residuals of her work injuries but he opined that she was not totally disabled and could work in a sedentary position four to six hours daily. Dr. Iverson noted restrictions of no twisting, bending/stooping, operating a motor vehicle, squatting, kneeling or climbing, sitting limited to 3 to 4 hours, walking limited to 30 minutes, standing limited to 1 to 2 hours, reaching and reaching above the shoulder limited to 30 minutes, pushing, pulling and lifting limited to 30 minutes and 10 pounds, with 15-minute breaks every 2 hours and may use cane, crutches and walker as needed. On May 26, 2005 he noted reviewing the September 7, 2004 job description opined that more likely than not appellant could accomplish these duties for six hours daily.

The Board finds that, under the circumstances of this case, the opinion of Dr. Iverson is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight and establishes that appellant could work a modified position subject to the restrictions set forth above. His opinion as set forth in his reports of July 21, 2004 and May 26, 2005 are found to be probative evidence and reliable and represents the weight of the medical evidence. Dr. Iverson clearly opined that appellant could return to work subject to the restrictions set forth in his work restriction reports of July 21, 2004 and May 26, 2005. The Board finds that his opinion with respect to appellant's work limitations is based on a proper factual background and is sufficient to establish that the position is medically suitable to her work restrictions.[15]

[13] 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

[14] *Solomon Polen*, 51 ECAB 341 (2000).

[15] *See generally Melvina Jackson*, 38 ECAB 443, 450 (1987) (discussing the factors that bear on the probative value of medical opinions).

The record reflects that the physical restrictions of the modified position offered to appellant on September 20, 2005 conformed to the limitations provided by Dr. Iverson. In his reports of July 21, 2004 and May 26, 2005, Dr. Iverson, as noted, advised that appellant could work, within restrictions, a sedentary position for six hours per day. The job offered by the employing establishment specifically indicated that appellant would work six hours per day as a modified mail processor and the duties included reworking waste mail up to four hours per day, manual casing in modified case up to four hours per day, switchboard relief up to five hours per day, and apply code and labels up to two hours per day. The physical requirements of the position included lifting, pushing, pulling up to 10 pounds no more than 30 minutes per day, no twisting, bending, stooping, squatting, kneeling or climbing, sitting for 3 to 4 hours per day, walking no more than 30 minutes, standing no more than 1 to 2 hours, no reaching above the shoulder more than 30 minutes with a wheelchair available if needed.[16] The Board finds that the physical requirements of the offered position are consistent with the work restrictions set forth by Dr. Iverson and that the offered position is medically suitable to appellant's work restrictions.

To properly terminate compensation under section 8106(c), the Office must provide appellant notice of its finding that an offered position is suitable and give her an opportunity to accept or provide reasons for declining the position.[17] The Office properly followed its procedural requirements in this case. By letter dated November 2, 2005, the Office advised appellant that a partially disabled employee who refused suitable work was not entitled to compensation, that the offered position had been found suitable and allotted her 30 days to either accept or provide reasons for refusing the position.[18] Appellant responded by letter dated November 23, 2005 and advised that she moved 150 miles away to Miles City, Montana, and asserted that there were unresolved issues in her case. This evidence was insufficient to show that the offered position was not medically suitable. The evidence suggests that appellant's relocation was voluntary and constitutes a personal reason for the relocation, and the Board has held that relocation for personal reasons is insufficient to constitute a reasonable basis for refusal of suitable work.[19] The medical evidence thus establishes that, at the time the job offer was made, appellant was capable of performing the modified position.[20]

[16] The Board notes that the September 20, 2005 job offer was essentially the same as the September 7, 2004 offer but noted that a wheelchair was available if needed.

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

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

[19] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2-814.5(c) (July 1997) indicates that unacceptable reasons for refusing an offer of suitable work include the claimants; preference for the area in which he or she currently resides, personal dislike of the position offered or the work hours scheduled, potential for promotion, and job security; *see also Susan L. Dunnigan*, 49 ECAB 267 (1998) (finding that appellants explanation that she had to relocate with her husband who was in the military was exemplary, but also constituted a personal reason for the relocation, and found to be unacceptable); *Fred L. Nelly*, 46 ECAB 142 (1994) (finding that appellant's reason for refusing suitable work, that he lived 1,200 miles from the employing establishment, was unacceptable).

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

Thereafter, on February 15, 2006 the Office advised appellant that the reasons given for not accepting the job offer were unacceptable. The Office advised that she had 15 days to accept the offer and if she did not, a final decision under 5 U.S.C. § 8106(c)(2) would be made. Appellant did not submit any medical evidence to show that the offered position was not medically suitable.[21] Thus, under section 8106(c), her compensation was properly terminated.

As the Office met its burden of proof to terminate appellant's 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.[22]

Following the Office's March 8, 2006 decision, appellant testified at the hearing and argued that her condition had worsened in the last two years and she could not work six hours per day. She submitted a report from Dr. Iverson dated July 27, 2006 in which he indicated that it appeared that appellant was unable to work a regular six-hour day and would more likely than not be confined to working four hours per day. However, this report is insufficient to establish that the position offered appellant was unsuitable as the physician did not provide a reasoned opinion explaining how or why appellant's diagnosed conditions prevented her from performing the job duties of the modified position at the time her compensation was terminated, nor did Dr. Iverson retract or distinguish his prior reports that found that appellant could work a limited-duty position six hours per day subject to restrictions. These reports are insufficient to establish that the position offered appellant was unsuitable as the physician did not explain how any particular diagnosed conditions prevented her from performing specific job duties of the modified position. This evidence is insufficient to meet appellant's burden of proof.

On appeal, appellant alleged that the Office improperly terminated her schedule award when she refused the job offer. The Board notes that Congress has defined compensation to include money payments made for schedule awards under section 8107 of the Act,[23] the Board finds that appellant's refusal to accept suitable work constitutes a bar to his receipt of a schedule award for any impairment which may be related to the July 7, 2000 employment injury after she refused suitable work. Applying the section 8106(c) penalty provision to the statute, as a whole, is in accordance with the rules of statutory construction set forth and consistent with prior Board

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

[22] *See Ronald M. Jones*, 52 ECAB 190 (2000).

[23] 5 U.S.C. § 8107.

precedent which has given effect to section 8132 and section 8106(b)(2) to the whole statute as enacted.[24]

LEGAL PRECEDENT -- ISSUE 2

Section 8126[25] of the Act provides that the Secretary of Labor, on any matter within her jurisdiction, may issue subpoenas for and compel attendance of witnesses within a radius of 100 miles. This provision gives the Office discretion to grant or reject requests for subpoenas. Subpoenas for witnesses will be issued only where oral testimony is the best way to ascertain the facts.[26]

In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method to obtain such evidence because there is no other means, by which the testimony could have been obtained.[27] Additionally, no subpoena will be issued for attendance of employees of the Office acting in their official capacities as decision-makers or policy administrators.[28]

The Office hearing representative retains discretion on whether to issue subpoenas. The function of the Board on appeal is to determine whether there has been an abuse of discretion. Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonably exercise of judgment, or action taken, which is clearly contrary to logic and probable deductions from established facts.[29]

ANALYSIS -- ISSUE 2

By letter dated May 31, 2006, appellant requested subpoenas for Drs. Iverson and Erpelding to appear at the oral hearing and provide testimony. In a July 6, 2006 decision, the Office denied the subpoena request finding that appellant had failed to explain why the documents, or person, requested were directly related to the issue at hand or that a subpoena was the best method for obtaining the requested information.

To establish that the Office abused its discretion, appellant must show proof of manifest error, a clearly unreasonably exercise of judgment, or action taken, which is clearly contrary to logic and probable deductions from established facts. The mere showing that the evidence would support a contrary conclusion is insufficient to prove an abuse of discretion.[30]

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[24] 5 U.S.C. § 8106(c)(2); *see Arthur E. Anderson*, 43 ECAB 691 (1992); *Stephen R. Lubin*, 43 ECAB 564 (1992).

[25] 5 U.S.C. § 8126.

[26] *See* 20 C.F.R. § 10.619.

[27] *Id*.

[28] 20 C.F.R. § 10.619(b).

[29] *Dorothy Bernard*, 37 ECAB 124 (1985).

[30] *See Joseph P. Hofmann*, 57 ECAB ___ (Docket No. 05-1772, issued March 9, 2006).

In the present case, appellant has not met her burden to show abuse of discretion. Although she advised that the documentation produced by Drs. Iverson and Erpelding has been misinterpreted and that subpoenas would be the only method to obtain a complete and accurate assessment of the reports previously submitted, she failed to provide an explanation of why the testimony of the persons would be relevant to the issue in his claim or why a subpoena was the best method or opportunity to obtain such evidence. Appellant did not provide any evidence to support that any additional probative information would be elicited by compelling the attendance of the persons requested. Therefore, the Board finds that the hearing representative did not abuse his discretion in denying subpoenas, as he found that the testimony could be obtained by other means.

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's disability compensation under 5 U.S.C. § 8106(c)(2) for refusal of suitable employment. The Board further finds that the Office properly denied appellant's subpoena requests.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 8 and July 6, 2006 are affirmed.

Issued: February 11, 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