United States Department of Labor
Employees' Compensation Appeals Board

Y.S., Appellant	)	
and	)	**Docket No. 08-336**
	)	**Issued: June 23, 2008**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Carol Stream, IL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 13, 2007 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated May 8, 2007 which affirmed the termination of her compensation on the grounds that she abandoned suitable work. She also timely appealed a September 14, 2007 nonmerit decision denying merit reconsideration. Pursuant to 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 effective February 28, 2006 on the grounds that she abandoned suitable work pursuant to 5 U.S.C. § 8106(c)(2); and (2) whether the Office properly denied further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On September 3, 2003 appellant, then a 34-year-old mail handler, filed an occupational disease claim alleging that on July 1, 2003 she first realized her cervical and thoracic strains were employment related. The Office accepted the claim for cervical and thoracic strains and temporary aggravation of a herniated cervical spine disc.[1] Appellant received appropriate compensation benefits.

On October 17, 2005 Dr. Daniel J. Harrison, a Board-certified neurosurgeon, performed a C5-6 laminectomy and decompression with limited foraminotomies and spinal canal nerve root decompression.

On October 21, 2005 the Office referred appellant to Dr. Michael Orth, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Edward S. Forman, a second opinion osteopath, and Dr. Jacob Salomon, a treating Board-certified surgeon, regarding the nature and extent of any continuing disability. In a November 28, 2005 report, Dr. Orth opined that appellant never had any work-related condition and there was no work-related injury, even though one was accepted. He opined that appellant had no work-related impairment. Dr. Orth found that appellant had work restrictions as a result of the anterior cervical fusion. These restrictions included a sedentary position with no lifting more than five pounds, no climbing, crawling, or kneeling and no extension or flexion of the neck.

On December 14, 2005 the employing establishment offered appellant a limited-duty modified mail handler position based upon the restrictions set by Dr. Orth. The duties of the position included taping torn flats weighing five pounds or less and putting them in an envelope, nonrepetitive duties. The restrictions included a sedentary position with no lifting more than five pounds, no kneeling, crawling, climbing and no neck flexion or extension. The location of the position was at Carol Stream Processing Distribution Center.

On December 15, 2005 appellant rejected the position as she needed to complete physical therapy. The form was signed by Dr. Harrison.

By letter dated January 10, 2006, the Office advised appellant that the offered position remained available and was suitable work within her medical and vocational capabilities. The Office found Dr. Harrison's prescription for further physical therapy did not provide sufficient reason for refusing the job offer and afforded her 30 days to accept the position or provide a written reason for her refusal. Appellant was informed that, if she failed to report for work or provide adequate justification for her refusal, her compensation would be terminated.

In a February 7, 2006 disability certificate, Dr. Salomon indicated that appellant was disabled from January 12 to February 17, 2006 due to her laminectomy. He recommended appellant be changed to the day shift and accept the job offer and restrictions as stated.

[1] This was assigned claim number 10-2025241.

In a February 10, 2006 letter, the Office informed appellant that her reasons for refusing the position were not acceptable and afforded her an additional 15 days to accept the offered position or her compensation would be terminated.

In a February 15, 2006 disability certificate, Dr. Salomon indicated that appellant would be capable of returning to work with restrictions on March 2, 2006.

In an undated report faxed to the Office on February 16, 2006, Dr. Salomon noted that appellant could not work nights due to the extreme stress between her and her night supervisor. He referenced an attached July 10, 2003 agreement signed by appellant's union steward and another physician that her supervisor have no contact with or supervisory authority over appellant.

On February 26, 2006 appellant accepted the modified-job assignment. She returned to night work on February 27, 2006. Appellant stopped work on February 28, 2006.

Appellant subsequently submitted disability slips dated February 15 and March 16, 2006 from Dr. Salomon, who indicated that she was disabled beginning February 27, 2006 but could return to work on April 16, 2006.

On March 23, 2006 the Office noted that appellant had stopped work on February 28, 2006 contending that she was totally disabled. It noted that the modified mail handler position was found to be within her work capabilities. The Office allowed appellant 30 days to either return to work or provide an explanation for abandoning the position. Additionally, it advised appellant of the consequences under 5 U.S.C. § 8106(c)(2) of refusing an offer of suitable work.

On April 10, 2006 Dr. Salomon released appellant to work effective April 17, 2006. On May 5, 2006 he indicated that appellant was totally disabled for the period May 2 to 12, 2006 due to cervical muscle spasm and pain secondary to her surgery.

On May 16, 2006 the Office received Dr. Salomon's work restrictions which included working four hours per day effective April 19, 2006.

On June 16, 2006 the Office referred appellant to Dr. Gary S. Skaletsky to resolve the conflict in the medical opinion evidence on the issue of whether appellant continued to have residuals of her accepted work injury and whether the October 17, 2005 surgical intervention was warranted and due to the employment injury.

On July 27, 2006 Dr. Skaletsky, based upon a review of the medical evidence, statement of accepted facts and physical examination, diagnosed chronic neck pain and possible bilateral cervical radiculopathy. He concluded that appellant continued to have residuals of her accepted employment injury and that the October 17, 2005 surgery was medically warranted and due to her employment injury. With respect to appellant's disability for the period February 28 to April 16, 2006 and disability beginning May 2, 2006, he opined that it was work related as appellant was unable to lift up to 70 pounds for eight hours per day and reach above her shoulder for up to six hours per day.

On August 18, 2006 the Office requested that Dr. Skaletsky provide a supplemental report based upon appellant's modified job requirements and whether he agreed with Dr. Orth's opinion. In a September 1, 2006 supplemental report, Dr. Skaletsky noted that he had not reviewed Dr. Orth's opinion at the time of his prior report and noted it did not change his opinion about appellant's condition. He noted the limited duties appellant was performing as of February 27, 2006 and advised that his prior opinion that she was totally disabled from February 28, 2006 through April 16, 2006 "was not reasonable or appropriate." Dr. Skaletsky stated that the duties she performed were within her limitations and appellant was capable of performing the limited-duty job during her claimed period of disability. The duties "could not have caused any symptoms rising to a level of disability during that time."

By decision dated September 19, 2006, the Office terminated appellant's wage-loss benefits effective February 28, 2006 pursuant to 5 U.S.C. § 8106(c)(2) on the grounds that she abandoned suitable work. The Office informed appellant that her cervical surgery performed by Dr. Harrison on October 17, 2006 had been accepted.

On September 26, 2006 appellant requested an oral hearing before an Office hearing representative, which she subsequently changed to a request for a review of the written record.[2] She submitted additional medical and factual information, including the employing establishment's acceptance to investigate appellant's complaint of discrimination by her supervisor.

By decision dated February 16, 2007, the Office hearing representative affirmed the September 19, 2006 termination of benefits due to her abandonment of suitable work on February 28, 2006.

On March 30, 2007 the Office received appellant's March 22, 2007 request for reconsideration. In a July 7, 2006 report, Dr. B.J. Beresford, an attending Board-certified psychiatrist, diagnosed panic episodes, anxiety and depression which caused appellant to be totally disabled for the period February 27, 2006 to the present.

By decision dated May 8, 2007, the Office denied modification of the February 16, 2007 decision.

On July 13, 2007 appellant requested reconsideration[3] and submitted a June 14, 2007 report from Dr. Darwin A. Minnis, a treating physician, and an October 3, 2006 note from Dr. Mark Hroncich. Dr. Minnis advised that appellant could not perform her limited-duty job due to her major depression and anxiety disorder. Dr. Hroncich noted that he had treated appellant for depression and referred her to a psychiatrist for consultation.

[2] The record indicates that appellant requested an oral hearing on her claim numbers 10-2025241 and 10-2056383. The record indicates that claim number 10-2056383 was an emotional condition claim.

[3] Appellant requested reconsideration on claim numbers 10-2025241 and 10-2056383.

On September 14, 2007 the Office denied appellant's request for reconsideration of the merits of her claim. It found that the evidence was irrelevant as it did not address the issue of abandonment.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act provides at section 8106(c)(2) that a partially disabled employee who refuses or neglects to work after suitable work is offered is not entitled to compensation.[4] Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits under section 8106 for refusing to accept or neglecting to perform suitable work.[5] The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to future compensation and, for this reason, will be narrowly construed.[6] To establish that a claimant has abandoned suitable work, the Office must substantiate that the position offered was consistent with the employee's physical limitations and that the reasons offered for stopping work were unjustified.[7] The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is a medical question that must be resolved by the medical evidence of record.[8]

The Board has held that due process and elementary fairness require that the Office observe certain procedures before terminating a claimant's monetary benefits under section 8106(c)(2) of the Act.[9] Section 10.516 of the Office regulations state 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.[10] Thus, before terminating compensation, the Office must review the employee's proffered reasons for refusing or neglecting to work.[11] 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.[12]

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[4] 5 U.S.C. § 8106(c)(2).

[5] *See Mary E. Woodard*, 57 ECAB 211 (2005); *Bryant F. Blackmon*, 56 ECAB 752 (2005); *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

[6] *See Karen M. Nolan*, 57 ECAB 589 (2006); *Richard P. Cortes*, 56 ECAB 200 (2004); *H. Adrian Osborne*, 48 ECAB 556 (1997).

[7] *See Stephen A. Pasquale*, 57 ECAB 396 (2006); *Wayne E. Boyd*, 49 ECAB 202 (1997).

[8] *See John E. Lemker*, 45 ECAB 258 (1993); *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

[9] 5 U.S.C. § 8106(c)(2); *see also Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff d on recon.*, 43 ECAB 818 (1992).

[10] 20 C.F.R. § 10.516.

[11] *See Maggie L. Moore*, *supra* note 9.

[12] 20 C.F.R. § 10.516*; see Sandra K. Cummings*, 54 ECAB 493 (2003).

Once the Office establishes that the work offered was suitable, the burden of proof shifts to the employee who refuses to work to show that such refusal or failure to work was reasonable or justified.[13] The determination of whether an employee is physically capable of performing a modified position is a medical question that must be resolved by medical evidence.[14] Office procedures state that acceptable reasons for refusing an offered position include medical evidence of inability to do the work or travel to the job.[15] 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.[16]

ANALYSIS -- ISSUE 1

The Board finds that the Office failed to provide appellant with proper notice prior to terminating her compensation pursuant to 5 U.S.C. § 8106(c)(2). The Office advised appellant on January 10, 2006 that the offered position of modified mail handler was deemed suitable for her work capabilities. Additionally, the Office informed appellant of the consequences under 5 U.S.C. § 8106(c)(2) of refusing an offer of suitable work. Appellant returned to work on February 27, 2006 and stopped work the following day, February 28, 2006.

In a letter dated March 23, 2006, the Office allowed appellant 30 days to either return to work or provide an explanation for abandoning the position. Appellant subsequently returned to work on April 17, 2006 and stopped again on May 2, 2006. She submitted disability notes from Dr. Salomon for the relevant period of disability. On June 16, 2006 the Office referred appellant for another impartial examination. The Office found there was a conflict as to whether her October 17, 2005 surgery was medically warranted and due to her accepted employment injury and whether she continued to have residuals of her accepted employment injury. In a report dated July 27, 2006, Dr. Skaletsky opined that the surgery was medically warranted and related to appellant's accepted employment injury. He also determined that she was disabled for the periods in question as she was unable to perform the duties of lifting more than 70 pounds and performing repetitive work with her upper extremities. In a supplemental report dated September 1, 2006, Dr. Skaletsky noted that appellant was not disabled from performing her limited-duty job beginning February 28, 2006 as it was within her physical restrictions due to her accepted employment injury.

In a decision dated September 19, 2006, the Office terminated appellant's compensation under section 8106(c) on the grounds that she abandoned suitable work. After appellant stopped work on February 28, 2006, the Office undertook additional development of the evidence. However, prior to the September 19, 2006 decision finding abandonment, the Office did not provide her with either the 30- or 15-day notice of the penalty provisions if she refused to return to the limited-duty job. The Office did not verify, prior to termination on September 19, 2006,

[13] 20 C.F.R. § 10.517(a); *Deborah Hancock*, 49 ECAB 606 (1998).

[14] *See Robert Dickerson*, 46 ECAB 1002 (1995).

[15] *Id.*

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(5) (July 1996); *see Susan L. Dunnigan*, 49 ECAB 267 (1998).

that the position was still open and available for appellant. The Office failed to provide the appropriate notice to appellant prior to terminating compensation.[17] While the Office followed proper procedures in offering the suitable work position to appellant,[18] it did not complete the procedures necessary to establish that she had abandoned suitable work.[19] After its March 23, 2006 letter advising her that she had 30 days to either return to work or provide an explanation for abandoning the position, appellant did return to work on April 17, 2006. Appellant stopped again on May 2, 2006 and the Office initiated further development of the medical evidence. Following receipt of Dr. Skaletsky's July 27 and September 1, 2006 supplemental report, the Office did not allow appellant the opportunity to return to work without penalty before terminating her monetary benefits. The Office's procedure manual provides that, if the abandonment of the job is not deemed justified, the Office must so advise the claimant and allow him or her the opportunity to return to work.[20] Accordingly, the Board finds that the Office improperly terminated appellant's compensation.

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation on the grounds that he abandoned suitable work.[21]

[17] *William M. Bailey*, 51 ECAB 197 (1999).

[18] *See* 20 C.F.R. § 10.516.

[19] *Mary G. Allen*, 50 ECAB 103 (1998).

[20] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.10(e)(1) (July 1996); *see also Sandra K. Cummings*, *supra* note 12.

[21] In view of the disposition of the first issue, the Board need not address the second issue.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 14 and May 8, 2007 are reversed.

Issued: June 23, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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