United States Department of Labor
Employees' Compensation Appeals Board

D.T., Appellant	)	
and	)	**Docket No. 08-339**
	)	**Issued: June 10, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Tustin, CA, Employer	)	

Appearances:
Appellant, pro se
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 November 9, 2007 appellant filed a timely appeal from the September 21, 2007 merit decision of the Office of Workers' Compensation Programs, which denied modification of an earlier decision terminating compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation on the grounds that she refused suitable work.

FACTUAL HISTORY

On June 12, 2001 appellant, then a 41-year-old rural letter carrier, filed a claim alleging that her back condition was a result of her federal employment. The Office accepted her claim for herniated lumbar discs and authorized surgery. Appellant received compensation for temporary total disability on the periodic rolls.

On June 25, 2004 Dr. E. Richard Dorsey, a psychiatrist and Office referral physician, diagnosed depressive disorder not otherwise specified. He explained that this condition was a result of appellant's work-related lumbar condition. But Dr. Dorsey reported that appellant was off work due to her physical and not her mental condition. Appellant's residual mental impairment secondary to her occupational back pain was slight, and she was mentally able to resume her usual and customary occupation or engage in any other occupation for which she was physically suited, subject to the preclusion of a high level of stress in the form of an unusually high pace, volume or pressure of work. The Office accepted appellant's claim for depressive disorder.

On January 20, 2005 Dr. Don R. DeFeo, appellant's neurosurgeon, reported that appellant was permanent and stationary. He stated that she could return to light duty with a maximum lifting, pulling or pushing restriction of 15 pounds frequently and 20 pounds occasionally. Dr. DeFeo stated that appellant should alternate her sitting, standing and walking as tolerated, parenthetically adding "every 20 minutes."

On March 4, 2005 the employer offered appellant a modified carrier position that limited lifting, pulling and pushing to no more than 15 pounds. The employer added: "You will be allowed to alternate your sitting, standing, and walking as per your doctor's medically defined work restrictions."

On March 16, 2005 appellant rejected the offer. She indicated she still had pain and that part of the job required bending, stooping and uncomfortable chairs. Appellant stated that both her feet were affected and that she could not wear closed-toe shoes for long periods. She also noted that she had depression due to the ridiculing and sexual harassment she experienced from her job performance. On April 12, 2005 appellant explained that she suffered depression, she was sexually violated by a 204b supervisor and the employer did nothing about it, she suffered harassment even after filing an Equal Employment Opportunity complaint, and she was subject to ridicule and mocked just because she could not perform her job. She added that she still had issues with her feet due to her back injury and that she could hardly wear closed-toe shoes, "so this is my explanation that this workplace is not safe for me physically and mentally."

On April 1, 2005 Dr. DeFeo approved the job offer with the following notation: "Neurosurgically [appellant] should be able to perform this job. However, I feel there are other areas that should be addressed prior to starting this position, such as her severe depression and the issue of not being able to wear closed-toe shoes due to possible dysesthesia in the left leg-foot."

On April 25, 2006 the Office notified appellant that the offered position was suitable and within the medical restrictions her physician reported on January 20, 2005. It confirmed that the position remained available and allowed appellant 30 days to accept the offer and report for duty or to explain her reasons for refusing the offer. The Office notified appellant that her right to compensation would be terminated if she failed to report without justification. On May 5, 2006 she responded that her mental and physical condition was no better and that she could not perform the job offered.

On June 23, 2006 the Office notified appellant that it had considered her reasons for refusing the offered position and found those reasons to be invalid. It noted that she submitted no medical evidence to support her claim that she was unable to perform the job. The Office allowed appellant another 15 days to accept and arrange for a report-to-work date and advised that it would terminate her compensation if she did not do so.

The Office received a disability slip from Dr. Norman J. Rosen, appellant's family physician, dated July 5, 2006, which indicated that appellant could return to work on October 5, 2006 with restrictions. Appellant requested and received authorization to see a psychiatrist, Dr. Ted R. Greenzang.

In a decision dated July 11, 2006, the Office terminated appellant's compensation under 5 U.S.C. § 8106(c)(2). The Office found that she failed to accept suitable employment without justification.

On July 13, 2006 Dr. Greenzang diagnosed appellant with depressive disorder not otherwise specified, together with depression and anxiety impacting upon her recurrent headaches. He reported that appellant became partially temporarily disabled psychiatrically beginning approximately June 2001. Dr. Greenzang stated that she was now permanent and stationary and remained partially temporarily disabled psychiatrically in regard to her ability to compete in the open labor market. He reported that appellant was unable from a psychiatric standpoint to return to her usual and customary employment due to ongoing dysphoric symptoms and the emotional handicap precipitated by physical symptoms referable to her lower back and lower extremity. Dr. Greenzang described her disability as slight to slight-to-moderate. Appellant requested reconsideration.

In a decision dated September 21, 2007, the Office reviewed the merits of appellant's case and denied modification of its prior 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

[1] 5 U.S.C. § 8106(c)(2).

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

burden of showing that the work offered to and refused or neglected by the employee was suitable.[3]

ANALYSIS

On January 20, 2005 Dr. DeFeo, the attending neurosurgeon, reported that appellant could return to work with restrictions. Shortly thereafter, the employer offered her a modified carrier position strictly tailored to those restrictions. Appellant rejected the offer, but Dr. DeFeo reviewed the position and approved it. "Neurologically," he stated, "[appellant] should be able to perform this job."

Appellant's complaints to the contrary carry little weight. Her capacity to perform the job is a medical question that must be determined by the medical evidence. Dr. DeFeo was appellant's attending neurosurgeon for years and he provided persuasive evidence that the offered position was suitable from a neurological standpoint. The disability slip from Dr. Rosen, appellant's family practitioner, also carries little weight. The slip offers no medical rationale and does not indicate whether Dr. Rosen ever reviewed appellant's job offer. The Board therefore finds that the medical evidence does not support appellant's contention that she was physically unable to perform the offered position.

Dr. Dorsey, a psychiatrist and Office referral physician, reported on June 25, 2004 that appellant was off work due to her physical and not her mental condition. He explained that the residual mental impairment secondary to her occupational back pain was slight. Just after the Office terminated compensation, Dr. Greenzang, a psychiatrist, reported that appellant's disability was slight to slight-to-moderate. He stated that she remained partially temporarily disabled psychiatrically in her ability to compete in the open labor market and was unable to return to her usual and customary employment. But the issue is not whether appellant could return to her date-of-injury position as a rural letter carrier. The issue is whether she could perform the offered position of a modified carrier. Like Dr. Rosen, Dr. Greenzang gave no indication that he ever reviewed the job offer. He never directly addressed whether appellant was mentally capable of performing the job. The Board therefore finds that the medical evidence does not support appellant's contention that she was mentally unable to perform the offered position.

The Office has met its burden of proof. The evidence establishes that appellant was no longer totally disabled for all work. She was partially disabled and could return to work within certain restrictions. The employer offered appellant a modified position within those restrictions and with the approval of her neurosurgeon. Although she argues that she was mentally unable to perform this job, the psychiatric evidence does not back her up. The Office followed proper procedure and provided appellant due process. Because she, a partially disabled employee, refused suitable work after suitable work was offered to her, she is not entitled to compensation as a matter of law. The Board will affirm the Office's September 21, 2007 decision terminating appellant's compensation under 5 U.S.C. § 8106(c)(2).

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

CONCLUSION

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

ORDER

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

Issued: June 10, 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