United States Department of Labor
Employees' Compensation Appeals Board

S.H., Appellant	)	
and	)	**Docket No. 08-1096**
	)	**Issued: November 25, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Birmingham, AL, 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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On March 4, 2008 appellant filed a timely appeal from the January 28, 2008 merit decision of the Office of Workers' Compensation Programs, which denied modification of the termination of her 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 for refusing suitable work.

FACTUAL HISTORY

On July 3, 2001 appellant, then a 46-year-old rural carrier, broke her hip in the performance of duty. She thought her vehicle was going to turn over and she jumped out. The Office accepted her claim for a closed fracture of the pelvis and blunt trauma to the head. Appellant received compensation for temporary total disability on the periodic rolls. On

November 19, 2001 she returned to limited duty for four hours a day. In March 2002 appellant began work hardening.

On June 18, 2002 appellant underwent a functional capacity evaluation (FCE), which found that she was capable of returning to modified duty for eight hours a day. The FCE reviewed the physical demands of appellant's regular position as a rural carrier and found that she could not lift 70 pounds or carry 45 pounds, as required. The FCE specified limitations on these activities and indicated that appellant could otherwise perform her regular duties. On August 14, 2002 Dr. James P. Stannard, appellant's orthopedic surgeon, reviewed the FCE and agreed with all of its findings: "The FCE limitations, I believe, should be adhered to and I sign off on those." On April 13, 2004 he wrote: "[Appellant] had the FCE on July 28, 2002. She must work within the restrictions of the FCE which was in the light demand level up to an eight-hour day -- permanently."

On June 23, 2005 the employer offered appellant permanent accommodation in her regular position as a rural carrier: "Based on permanent work restrictions determined by the FCE, it has been determined that with accommodations provided by management you can perform all the duties of your regular position with the postal service." The employer described the physical requirements and duties of the position and specified the physical restrictions reported in the FCE.

Appellant rejected the offer. She argued that regular rural routes were not to be considered for any light-duty assignment. Appellant argued that she could not drive on poor roads for four to five hours a day and could not perform trunk rotation four to five hours a day to retrieve mail from the back seat of her vehicle. She also argued that she did not know how to contact her post office for assistance with parcels or packages exceeding her weight limitation.

On July 18, 2005 the Office found the offered position suitable and currently available. It gave appellant 30 days to accept and notified her of the statutory penalty for refusing suitable work. The employer advised that turning around to retrieve mail from the back seat was considered a safety hazard, so appellant was prohibited from doing it. The employer also advised that time was built into her schedule several times a day to get out of her vehicle, get part of the mail from the back seat and put it in the front seat next to her for delivery.

Presenting similar arguments, appellant once again refused the offered position. She stated: "This offered job and working conditions are not suitable to my work capabilities and would be intolerably painful for me."

On August 30, 2005 the Office notified appellant that her reasons for refusing the offer were unacceptable. It gave her an additional 15 days to accept.

After verifying the offered position remained available to appellant, the Office issued a final decision on September 26, 2005 terminating her compensation. It found that she refused an offer of suitable work.

Appellant testified at a July 27, 2006 hearing before an Office hearing representative that her route could not be modified. She submitted medical reports, a memorandum of understanding intended to show that she had to relinquish her route and a provision of the

collective bargaining agreement: "In the rural carrier craft, at any local installation, regular rural routes shall not be considered for any light-duty assignment."

The employer submitted a copy of the memorandum of understanding and noted that it gave the employer the choice not to have appellant relinquish her route if the employer determined, after review of the medical documentation, that she, with reasonable assistance, was able to case and deliver her entire route. The employer argued that the provision of the collective bargaining agreement appellant cited was inapplicable, as the offer was not for "light duty" but for a permanent accommodated assignment, which the memorandum of understanding authorized in lieu of having appellant relinquish her route.

In a decision dated October 2, 2006, the hearing representative affirmed the termination of appellant's compensation. The hearing representative found that the offered position was suitable, that the Office complied with all procedural requirements and that appellant refused an offer of suitable employment.

Appellant requested reconsideration. She argued that the job was not suitable and not consistent with her medical restrictions. Appellant noted that after her FCE, Dr. Stannard determined that she was not able to safely meet the work demands of a rural carrier. She submitted Dr. Stannard's September 19, 2007 report, which stated that her situation remained unchanged since the FCE in 2002:

> "[Appellant] is still not able to perform her rural route duties as a postal worker, nor is she capable of stooping, repetitive squatting, climbing on a ladder and repetitive trunk rotation (as demanded by her job to retrieve mail from the back of a vehicle). She is physically unable to sit in a straddle position, as required by her job, secondary to pain. … Again, as per her FCE performed in June 2002, [appellant] is able to return to modified work duty, with lifting and carrying to her abilities as stated on page 2 of her FCE evaluation."

In a decision dated January 28, 2008, the Office reviewed the merits of appellant's claim and denied modification of its prior decision. It noted that appellant was offered a modified version of her rural carrier position that was within the physical restrictions outlined in the 2002 FCE. The Office also noted that appellant had submitted no medical evidence clearly explaining that she could not perform the permanent accommodation assignment.

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 her 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, it 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

[1] 5 U.S.C. § 8106(c)(2).

establishing that a position has been offered within the employee's work restrictions and 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]

ANALYSIS

The Office has met its burden to demonstrate that appellant can work. Indeed, appellant began working part-time limited duty in late 2001. After work hardening, an FCE in 2002 showed that she was capable of working eight hours a day with restrictions[4] and her orthopedic surgeon, Dr. Stannard, signed off on the findings. He reported that appellant could work eight hours a day within the restrictions outlined by the FCE. So the record establishes that appellant was able to return to work with specific restrictions. The only question that remains is whether the work offered to and refused by appellant was suitable.

On June 23, 2005 the employer offered appellant a permanent job accommodation, a modified version of her rural carrier position reflecting the physical limitations outlined by the FCE. The Board has carefully reviewed the specific job requirements of the offered position and finds that they are consistent with the restrictions outlined in the FCE. The offer indicated that the postmaster would make whatever accommodations were necessary to allow appellant to work within her restrictions, including, but not limited to, giving appellant the option of placing mail in half trays, making multiple trips to her vehicle to load and unload her mail, receiving assistance to load and unload her vehicle, assigning packages exceeding her weight limit to someone else for delivery and having someone else perform carrier pick-up service.

Appellant nonetheless rejected the offer. She argued that regular rural routes were not to be considered for any light-duty assignment, but the employer explained that this was not light duty; this was a permanent accommodated assignment. Appellant argued, and Dr. Stannard repeated, that the position required repetitive trunk rotation while sitting. But the employer made clear that this was not a requirement of the position; it was a safety hazard and a prohibited practice. Appellant argued that she could not drive on poor roads for four to five hours a day. But Dr. Stannard did not restrict her from driving. Her fear that intolerable pain would prohibit her from performing the duties of the offered position is speculative and not reasonable grounds for rejecting the employer's offer.[5]

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

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

[4] This finding showed that appellant had a wage-earning capacity that was greater than the part-time work she was currently performing. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5.a (2) (July 1997).

[5] If appellant had developed intolerable pain after accepting the offer and attempting her duties, and Dr. Stannard had reported that she was, in fact, disabled from the modified assignment, appellant could have been eligible for continuing compensation. But her rejection of the offer precluded those events from unfolding. The Office cannot allow claimants to self-certify their disability for work.

Appellant further justified her rejection of the offer because it appeared that a memorandum of understanding required her to relinquish the route to which the employer was attempting to return her. She submitted a copy of the memorandum to support her argument, but she deleted a critical passage, one that gave the employer the choice of allowing her to keep her route if the employer determined, after review of the medical documentation, that she, with reasonable assistance, was able to case and deliver the entire route. The June 23, 2005 offer thus appears consistent with the fuller, unedited version of the memorandum of understanding, which the employer provided.

Appellant contended that the offered position was not medically suitable, but she has submitted no medical opinion directly supporting this contention. Dr. Stannard signed off on the FCE findings, and the June 23, 2005 offer strictly followed those findings. His September 19, 2007 report states that appellant is still not able to perform her rural route duties, but this is not the issue. The employer did not attempt to return her to her regular rural carrier position. The employer attempted to reassign her to a modified job, consistent with the FCE and the memorandum of understanding. Dr. Stannard reported that appellant's situation remained unchanged since the FCE in 2002 and that she was able to return to modified-work duty, with lifting and carrying to her abilities as stated in the FCE. This is what the July 23, 2005 job offer provided.[6]

The Board finds that appellant refused an offer of suitable work and is subject to the penalty under 5 U.S.C. § 8106(c)(2). The Office has met its burden of proof to justify the termination of her compensation.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation for refusing suitable work.

[6] Although Dr. Stannard reported that appellant's situation remained unchanged since the 2002 FCE, his comment on stooping, squatting and climbing a ladder do not themselves appear to be completely consistent with the FCE, which found that appellant could occasionally squat and stoop and climb a ladder. The Board finds that Dr. Stannard's opinion is not well rationalized on this point.

ORDER

IT IS HEREBY ORDERED THAT the January 28, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 25, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board