United States Department of Labor
Employees' Compensation Appeals Board

Y.A., Appellant	)	
and	)	**Docket No. 08-254**
	)	**Issued: September 9, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Houston, TX, Employer	)	

Appearances:
Stephen V. Hunt, Sr., for the appellant
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 7, 2007 appellant filed a timely appeal from an October 16, 2007 decision of an Office of Workers' Compensation Programs' hearing representative who affirmed the termination of her compensation after she refused an offer of suitable work. 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 effective May 21, 2007 on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On November 30, 2005 appellant, then a 49-year-old letter carrier, sustained injury to her right shoulder when she lifted tubs of mail in the performance of duty. She stopped work on

December 1, 2005.[1] Appellant was treated by Dr. Charles Speller, an orthopedic surgeon, who diagnosed a capsular sprain and impingement syndrome of the right shoulder. The Office accepted the claim for a sprain/strain of the right shoulder and arm, right shoulder joint pain and right shoulder impingement syndrome. She was placed on the periodic rolls and received appropriate compensation benefits.

On April 3, 2006 Dr. Charles Covert, a Board-certified psychiatrist, noted that appellant was seen for progressively severe symptoms of anxiety, depression and pain subsequent to her November 30, 2005 injury. He reviewed her history of injury and medical treatment and diagnosed dysthymic disorder due to chronic moderate to severe pain involving the right shoulder following the accepted injury, which followed a prior surgery in 2001. Dr. Covert opined that there was a direct relationship between appellant's mental status and her November 30, 2005 employment injury and that she was totally disabled. In follow-up notes, Dr. Speller reiterated that appellant was totally disabled.

On July 12, 2006 the Office referred appellant to Dr. Michael LeCompte, a Board-certified orthopedic surgeon, for a second opinion medical evaluation. In a July 28, 2006 report, Dr. LeCompte set forth appellant's history of injury and treatment. He advised that appellant continued to have impingement syndrome of the right shoulder but that she was able to perform light duty with restrictions that precluded any overhead work. Appellant was unable to lift, push or pull greater than 10 pounds with the right upper extremity and was a candidate for a repeat decompression surgery to include a bursectomy, acromioplasty and excision of the distal clavicle. Dr. LeCompte noted that she had undergone physical therapy, injections and medication, which had not been effective. He also noted that there was an element of depression; however, it would not prevent her from returning to work.

The Office found a conflict in medical opinion arose between Dr. Speller, the treating physician, and Dr. LeCompte, the second opinion physician, on the issue of appellant's capacity for work. On October 5, 2006 the Office referred appellant, together with a statement of accepted facts and the medical record, to Dr. John Steele, a Board-certified orthopedic surgeon, selected as the impartial medical specialist.

Appellant underwent a functional capacity evaluation on November 10, 2006. She was found capable of performing work with a sedentary to light physical demand level and weight limitations on lifting of no more than 15 pounds infrequently and 10 pounds or less frequently. A work hardening program was also recommended and appellant underwent work hardening on November 17, 2006 for four weeks.

In a November 27, 2006 report, Dr. Steele reviewed appellant's history of injury and treatment. He conducted a physical examination and diagnosed postoperative arthroscopic

[1] The Office accepted an August 6, 2001 claim for right shoulder impingement syndrome. Appellant underwent arthroscopic surgery on December 3, 2001 with debridement, bursectomy and acromioplasty. She returned to modified part-time work on February 11, 2002 and to full-time modified duty on April 15, 2002. On April 8, 2003 the Office found that appellant's actual earnings as a modified city carrier fairly and reasonably represented her wage-earning capacity. Appellant received a schedule award for five percent impairment to her right arm. On June 12, 2006 the Office combined the claims.

debridement of the subacromial space with bursectomy and acromioplasty and residual significant impingement syndrome of the right shoulder aggravated by the November 20, 2005 injury. Dr. Steele agreed with the recommendation of repeat arthroscopic surgery of the right shoulder. He advised that appellant could work in a sedentary position provided she did not have to lift more than 10 pounds occasionally. Dr. Steele noted that the "depression of not being able to do her job" certainly contributed to her current condition but did not disable her from returning to work.

Dr. Speller submitted additional duty status reports advising that appellant remained totally disabled for work. On November 30, 2006 he discussed appellant's work hardening and noted progressive improvement in her right shoulder; however, he advised that appellant needed treatment for her emotional condition.

On January 24, 2007 the employing establishment offered appellant a modified duty as a mail handler. The position description included cutting bands and wrapping flat bundles, picking up flats and placing them in equipment. The physical requirements were listed as reaching, bending and stooping with the right shoulder for 30 minutes per hour, repetitive motion and pushing and pulling with the right shoulder for 4 hours. The position included a lifting requirement of no more than 10 pounds with the right shoulder. The position also included stretch breaks of 5 to 10 minutes per hour for the shoulder.

By letter dated February 28, 2007, the Office advised appellant and her representative that it found the modified-duty job offer suitable to her physical restrictions. Appellant was advised that she should accept the position or provide an explanation for refusing it within 30 days. The Office noted that, if she failed to accept the offered position and failed to demonstrate that such failure was justified, her compensation would be terminated.[2]

In treatment notes dated February 1 and March 1, 2007, Dr. Speller advised that appellant still had an emotional condition which had not been treated and was related to her right shoulder pain. He reiterated that she was unable to resume gainful employment. He continued to submit reports and advise that appellant was unable to work.

By letter dated March 1, 2007, the Office advised appellant that it had not accepted an emotional condition. However, it would refer her to a psychiatrist for a second opinion examination to determine whether she had an emotional condition related to her accepted injury. On March 8, 2007 the Office referred appellant to Dr. Jorge Raichman, a Board-certified psychiatrist.

By letter dated April 20, 2007, the Office informed appellant that her reasons for refusing the position were not acceptable and allowed an additional 15 days for her to accept the position. Appellant was advised that Dr. Steele, the impartial medical specialist, represented the weight of the medical evidence. She was advised that no further reason for refusing the position would be considered.

[2] This was the second 30-day letter. An earlier letter dated January 31, 2007 was reissued as appellant's representative was not provided with a copy.

In an April 29, 2007 report, Dr. Raichman addressed appellant's history of injury and medical treatment following the November 30, 2005 employment injury. He diagnosed major depression recurrent, avoidant personality disorder and moderate right shoulder impingement syndrome. Dr. Raichman indicated that her depression was not disabling and that she could work full time within the physical restrictions as outlined by the orthopedic surgeon. He advised that appellant would benefit from medications to improve her mood and that antidepressants would be very helpful for her and improve her demeanor, attitude and facilitate her return to work. Dr. Raichman noted that appellant was functioning well and her return to work would enhance her ability to function independently. He also noted that retuning to work would help to increase her self-worth, her financial situation and improve her isolated social situation. Dr. Raichman opined that appellant's emotional condition most likely preexisted the employment injury, but was "related in part" to persistent pain and the lack of improvement following her right shoulder injury. Appellant was able to perform her job within the physical restrictions outlined.

In a May 21, 2007 decision, the Office terminated appellant's monetary compensation benefits on the basis that she had refused suitable work. It noted that Dr. Raichman opined that she could work an eight-hour day with restrictions not to include overhead work or repetitive lifting. The Office determined that the report of Dr. Steele, the impartial medical examiner, represented the weight of the evidence as to her physical capacity for work.

Appellant subsequently submitted a May 1, 2007 report from Dr. David Suchowiecky, a psychiatrist. He addressed her medical history and diagnosed pain associated with psychological factors and a general medical disorder; anxiety state, unspecified; reactive anxiety; reactive depression; pain in the joint; sprain of the right shoulder and upper arm; and severe sacroiliitis. He recommended a psycho-educational and physical conditioning program. Dr. Suchowiecky opined that appellant was totally disabled both physically and psychologically due to the November 30, 2005 employment injury. Dr. Speller submitted additional notes finding that appellant remained totally disabled. On August 17, 2006 he disagreed with Dr. LeCompte's assessment of appellant's ability to resume work. Dr. Speller found that appellant was emotionally unstable with crying spells and depression and did not have the endurance or stamina to maintain gainful employment for an eight-hour shift. He recommended additional physical therapy and strengthening.

On June 2, 2007 the Office received the June 2, 2006 report of Glenn Bricken, Ph.D., a clinical psychologist. He addressed the medical history, noting that appellant had opted for conservative treatment rather than additional right shoulder surgery. Dr. Bricken advised that appellant was becoming increasingly deconditioned due to her injury, pain and apprehension of pain. He opined that she had a chronic pain disorder associated with both psychological factors and a general medical condition, with depression which developed from her work-related injury. Dr. Bricken advised that appellant was unable to work. In a June 12, 2007 report, he repeated his diagnoses. Dr. Bricken stated that appellant had severe chronic right shoulder pain and became increasingly deconditioned due to her injury and resulting sedentary behavior. He found that she was totally disabled.

On June 13, 2007 appellant's representative requested a review of the written record. He contended that the Office did not meet its burden of proof and acted prematurely in terminating

her benefits. Appellant's representative also alleged that a conflict arose as to whether appellant had a consequential emotional condition.

In a July 12, 2007 report, Dr. Suchowiecky stated that appellant had been a previously healthy individual, mentally and physically, who was now experiencing a full blown depressive disorder directly related to her injury of November 30, 2005. Her depressive symptoms included depressed mood, crying spells, anxiety, disruptive sleep patterns and a deflated sense of self-esteem. Dr. Suchowiecky advised that appellant could not return to any type of gainful employment, including the job assignment of January 24, 2007. Due to her physical and emotional symptoms, appellant remained totally disabled due to her November 30, 2005 injury.

In a September 10, 2007 statement, appellant contended that her emotional condition arose as a result of her August 6, 2001 employment injury and was aggravated by the November 30, 2006 employment injury. She alleged that she was unable to work as a result of her emotional condition.

By decision dated October 16, 2007, an Office hearing representative affirmed the May 21, 2007 termination decision.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation, including cases in which the Office terminates compensation under section 8106(c) for refusal to accept suitable work.[3]

Section 8106(c)(2) of the Federal Employees' Compensation Act provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee is not entitled to compensation.[4] Section 10.517(a) of the implementing federal regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured for her has the burden to show that the refusal or failure to work was reasonable or justified.[5] After providing the notices described in section 10.516, the Office will terminate the employee's entitlement to further compensation.[6] However, the employee remains entitled to medical benefits as provided by section 8103 or as justified. To

[3] *Sandra K. Cummings*, 54 ECAB 493 (2003).

[4] 5 U.S.C. § 8106(c)(2).

[5] 20 C.F.R. § 10.517(a).

[6] 20 C.F.R. § 10.516. This section provides that the Office shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter the Office's finding of suitability. If the employee presents such reasons, and the Office determines that the reasons are unacceptable, it will notify the employee of that determination and that he or she has 15 days in which to accept the offered work without penalty. At that point in time, the Office's notification need not state the reasons for finding that the employee's reasons are not acceptable.

support termination, the Office must show that the work offered was suitable,[7] and must inform appellant of the consequences of refusal to accept such employment.[8]

The determination of whether an employee is capable of performing modified duty is a medical question that must be resolved by probative medical opinion.[9] It is well established under Office procedures that, if the medical evidence documents a condition which has arisen since the compensable injury and the condition disables the employee, the job will be considered unsuitable.[10]

ANALYSIS

The Office accepted that appellant sustained injury to her right shoulder on November 30, 2005, accepted for sprain/strain of the right shoulder and arm with right shoulder impingement syndrome and pain. The medical evidence reflects that appellant had a prior employment injury to her right shoulder in August 2001 for which she underwent surgery on December 3, 2001.

A conflict in medical opinion arose between Dr. Speller and Dr. LeCompte as to appellant's capacity to return to full-time modified duty. She was referred for an impartial medical evaluation by Dr. Steele, a Board-certified orthopedic surgeon. Section 8123(a) of the Act 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."[11] Dr. Steele conducted a thorough evaluation of appellant. He found that residuals of her accepted right shoulder condition did not preclude her from working modified duty for eight hours a day, in a limited capacity with specified restrictions on lifting. Dr. Steele provided restrictions for sedentary duty. He advised that appellant could work in a sedentary position provided she did not have to lift more than 10 pounds, occasionally. Dr. Steele noted that she had depression which may have contributed to her condition but which did not disable appellant from returning to work.

When a case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical opinion, the opinion of such specialist, if sufficiently well rationalized and based on a proper background, must be given special weight.[12] Dr. Steele's opinion is entitled to special weight and establishes that appellant is physically capable of working eight hours per day in a sedentary position. Subsequently, the employing establishment offered appellant a sedentary

[7] *See Carl W. Putzier*, 37 ECAB 691 (1986); *Herbert R. Oldham*, 35 ECAB 339 (1983).

[8] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(d)(1) (July 1997).

[9] *See Gloria J. Godfrey*, 52 ECAB 486 (2001); *Robert Dickerson*, 46 ECAB 1002 (1995).

[10] *Id. See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (December 1993).

[11] 5 U.S.C. § 8123(a).

[12] *Kathryn Haggerty*, 45 ECAB 383, 389 (1994); *Jane B. Roanhaus*, 42 ECAB 288 (1990).

position that conformed to the work restrictions provided by Dr. Steele. By letter dated February 28, 2007, the Office advised appellant that the position was suitable and provided her 30 days to accept the position or provide reasons for her refusal. It further notified her that a partially disabled employee who refused suitable work was not entitled to compensation.

The Board notes, however, that the medical evidence clearly reflects that appellant was receiving medical treatment for an emotional condition which was attributed by her physicians to be a consequence of the accepted employment injury and which disabled her for work. The treatment records from Dr. Speller advised that she had an emotional condition which had not been treated properly and was due to chronic right shoulder pain. He advised that appellant was unable to resume gainful employment. Therefore, as of the Office's March 8, 2007 referral of appellant to Dr. Raichman, the Office had not established that the modified-duty job offer was medically suitable to appellant. Moreover, prior to the receipt of Dr. Raichman's April 29, 2007 report, the Office had notified appellant on April 20, 2007 that her reasons for refusing the offered position were not acceptable. Appellant was then given 15 days in which to accept the offered position or her monetary compensation would be terminated. The Office advised that no further reasons for refusing the position would be considered. After receiving Dr. Raichman's report, the Office terminated appellant's monetary benefits as of the May 21, 2007 decision. It listed the reports of Dr. Raichman and Dr. Steele as the weight of medical opinion.

In *Adrienne L. Curry*,[13] the Office terminated the employee's compensation based on her refusal of suitable work. The Board reversed this determination, noting that when the Office first made its suitability finding it relied on the medical opinion obtained from an impartial medical specialist. However, the Office subsequently determined that additional development of the medical evidence was required and that the impartial medical specialist had not reviewed the modified-duty position. The Board found that, as the report of the impartial specialist required clarification, the conflict in medical opinion had not been resolved as of the date the Office made its finding of suitability. The Board stated: "The Office obtained clarification when it received [the impartial specialist's] supplemental report of October 1, 1999, but this report does not retroactively validate the Office's June 30, 1999 suitability finding. The Board has held that the Office may not find a position suitable and then obtain the medical evidence to show it."[14] The Board found that, after obtaining the supplemental report of the impartial specialist, the employee was entitled to a new suitability determination and 30-day notification to accept the job offer.

This case is factually similar. On February 28, 2007 the Office advised appellant of its finding of suitability and provided her 30 days to accept the modified-duty position or provide reasons for refusing the job offer. This was based solely on the medical evidence addressing the physical residuals arising from the accepted injury to her right shoulder. However, the medical evidence documented a question as to a consequential emotional condition which the Office developed after the suitability determination. On March 1, 2007 she was advised that referral to a psychiatrist would be made to address this issue. As of April 20, 2007, when the Office issued its 15-day notice to appellant, it had not yet received any report from Dr. Raichman. In short, the

[13] 53 ECAB 750 (2002).

[14] *Id.* at 754.

Office did not establish the suitability of the offered position prior to the development of the emotional condition aspect of this claim.[15]

To properly terminate compensation under section 8106, 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.[16] The Office did not provide proper notice to appellant concerning the termination of her wage-loss benefits. By notifying her that she had 15 days to accept the position and that no further reasons for refusal would be considered, the Office deprived appellant of the due process protections addressed in *Maggie L. Moore*.[17] By not making a new suitability determination and allowing appellant a 30-day period after the Office's receipt of Dr. Raichman's report, as contemplated under its procedures, the Office effectively precluded appellant from offering a meaningful response to his medical opinion.[18]

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation effective May 21, 2007 on the grounds that she refused an offer of suitable work.

[15] The Office procedure manual notes that, if it is not possible to determine whether an employee's reason for refusing a job offer is valid without further investigation, the claims examiner should contact the employee for additional information and set another 30-day deadline. Chapter 2.814.5(d) (July 1997).

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

[17] *Id.* at note 8.

[18] The Board need not address whether there is a conflict in medical opinion as to whether appellant sustained a consequential emotional condition.

ORDER

IT IS HEREBY ORDERED THAT the October 16 and May 21, 2007 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: September 9, 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