

**United States Department of Labor
Employees' Compensation Appeals Board**

C.C., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
East Hartford, CT, Employer

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**Docket No. 08-1799
Issued: July 27, 2009**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 16, 2008 appellant filed a timely appeal from an April 25, 2008 merit decision of the Office of Workers' Compensation Programs affirming the termination of her monetary compensation based on her refusal of suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant established that her refusal of suitable work was justified.

FACTUAL HISTORY

This case has previously been before the Board. In a March 6, 2007 decision, the Board affirmed the Office's termination of appellant's compensation under 5 U.S.C. § 8106(c) on the grounds that she refused an offer of suitable work.¹ The Board found that the report of Dr. Peter T. Naiman, a Board-certified orthopedic surgeon and impartial medical specialist, established that she could work the modified position offered by the employing establishment

¹ Docket No. 06-1448 (issued March 6, 2007), *petition for recon., denied* (issued June 15, 2007).

which conformed to his restrictions. The facts and the circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference.²

On October 27, 2007 appellant, through her attorney, requested reconsideration before the Office. She asserted that she did not refuse suitable work; rather, she complied with every deadline and order to contact her employer with respect to her child care problems. Appellant's return to duty was postponed twice at the direction of the employer and the Office was incorrectly advised that she did not report for work. She contended that she reported to work on July 5, 2007 and agreed to sign a job offer with an addendum. However, the employer would not comply and told her not to report for work the next day. Appellant asserted that the Office erroneously determined that the job remained available to her when her employer would not permit her to return to work.

Appellant submitted reports from Dr. Michael J. Brennan, a Board-certified physiatrist, dated February 28 to April 24, 2007. Dr. Brennan reviewed her history, findings on examination and diagnosed chronic low back pain, heels spurs, myofascial pain syndrome, status post work-related injury while driving, rule out carpal tunnel syndrome. On March 26, 2007 he evaluated her for chronic pain and noted that she returned to work six hours a day. In duty status reports dated April 24 and May 23, 2007, Dr. Brennan noted clinical findings of spasms and limitation of range of motion and reduced appellant's work schedule to four hours a day subject to restrictions. In reports dated May 23 to August 14, 2007, he diagnosed persistent chronic low back pain, heel spurs, myofascial pain syndrome, rule out carpal tunnel syndrome. Dr. Brennan noted that appellant was working six hours per day with no new issues. On September 11 and October 5, 2007 he noted appellant's complaint of cervical and low back pain and work-related stress. Dr. Brennan repeated the diagnoses. Appellant also submitted physical therapy notes dated March 26 to May 25, 2007.

On February 26 2008 appellant's attorney contended that the Office was not justified in terminating appellant's compensation on the grounds that she refused an offer of suitable work.³ Appellant asserted that the position was not truly available because she was not permitted to return to work. She submitted an October 1, 2007 report of Dr. Mark Waynik, a Board-certified psychiatrist, who treated her for depression. Dr. Waynik diagnosed major depression, panic attacks and chronic spinal pain. He opined that appellant was totally disabled due to work-related stress. From November 2, 2007 to March 26, 2008 Dr. Brennan noted her complaints of chronic, intractable, noncancer pain and reported his diagnoses.

In an April 25, 2008 decision, the Office denied modification of its prior decision terminating appellant's compensation under section 8106.

² On July 18, 2000 appellant, then a 34-year-old letter carrier, filed a traumatic injury claim for a July 8, 2000 injury to her neck and back when her postal vehicle was rear-ended. The Office accepted the claim for a cervical strain and paid appropriate compensation. Appellant filed two other traumatic injury claims, file number xxxxxx641, accepted for sprain and strain of the neck and file number xxxxxx553, accepted for strain/strain of the thoracic spine and sprain/strain of the neck. These claims were combined into the claim file that is before the Board.

³ See *M.G.*, Docket No. 07-1515 (issued January 18, 2008).

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁴ In this case, it terminated appellant's compensation under section 8106(c)(2) of the Federal Employees' Compensation Act, which 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.⁵ As the Office met its burden of proof to terminate her compensation the burden shifted to her to show that her refusal to work in that position was justified.⁶ An employee who refuses or neglects to work after suitable work has been offered or secured for appellant's has the burden of showing that such refusal or failure to work was justified.⁷

ANALYSIS

As noted, the Board previously affirmed the Office's termination of appellant's compensation under section 8106(c) due to her refusal of suitable work. Appellant has the burden of proof to establish that her refusal to accept the offered modified-duty position was justified. The Board finds that she has not met her burden of proof.

On reconsideration appellant asserted that she did not refuse suitable work but had complied with the deadline set by her employer. She noted that she reported to work on July 5, 2005 and agreed to sign the job offer if she was permitted to include an addendum. However, the employer did not comply with her request and told her not to report for work the next day. Appellant asserted that the job offer was not truly available because her employer would not permit her to return to work. The Board notes that, it previously considered her assertion and, on reconsideration she has not submitted evidence to establish that she did not refuse suitable work. The Board previously noted that the employing establishment refused appellant's addendum and that she refused the job offer. Her contentions on appeal do not establish that her refusal of the offered job was justified. Appellant also asserted that the Office erroneously terminated her compensation for refusing suitable work because the employing establishment failed to notify her of a specific reporting date and citing to Board precedent.⁸ However, in the present case, there is no evidence that the employing establishment failed to specify a start date prior to the June 29, 2005 termination decision. Rather, the evidence establishes that the employer allowed appellant an opportunity to secure child care and report to work by June 27, 2005.

⁴ *Linda D. Guerrero*, 54 ECAB 556 (2003).

⁵ 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

⁶ *See Ronald M. Jones*, 52 ECAB 190 (2000).

⁷ *Gloria J. Godfrey*, 52 ECAB 486 (2001); *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.517(a).

⁸ *Supra* note 3. In *M.G.*, the Board found the evidence did not establish that appellant was specifically advised to report for duty on a particular date, finding that statements such that appellant "pretty much knew" when to begin work was insufficiently definite to show that she refused suitable work.

Appellant submitted reports from Dr. Brennan dated February 28, 2007 to March 26, 2008. Dr. Brennan findings and diagnoses but did not specifically address why she was unable to return to work in the offered position as of June 27, 2005. Moreover, he was on one side of the medical conflict that was resolved by Dr. Naiman. The Board has held that reports from a physician who was on one side of a medical conflict that an impartial specialist resolved, are generally insufficient to overcome the weight accorded to the report of the impartial medical examiner, or to create a new conflict.⁹

On October 1, 2007 Dr. Waynik diagnosed major depression, panic attacks and chronic spinal pain. He opined that appellant was totally disabled due to work-related stress. This evidence is insufficient to establish that her refusal of the offered position in 2005 was justified. Dr. Waynik did not explain how appellant's diagnosed conditions prevented her from performing the modified position when it was offered. The physical therapy notes of March 26 to May 25, 2007 are similarly insufficient. The Board has held that physical therapist's are not competent to render a medical opinion under the Act.¹⁰

CONCLUSION

The Board finds that appellant has not established that her refusal of suitable work was justified.

⁹ *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008).

¹⁰ *See David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physician's assistants, nurses and physical therapists are not competent to render a medical opinion under the Act); 5 U.S.C. § 8101(2) (this subsection defines a "physician" as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Worker's Compensation Programs dated April 25, 2008 is affirmed.

Issued: July 27, 2009
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board