United States Department of Labor
Employees' Compensation Appeals Board

L.C., Appellant	)	
and	)	**Docket No. 08-1923**
	)	**Issued: May 13, 2009**
DEPARTMENT OF THE ARMY, RED RIVER ARMY DEPOT, Texarkana, TX, Employer	)	

Appearances:
Alan J. Shapiro, Esq., 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 30, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' April 10 and May 14, 2008 merit decisions terminating her compensation and schedule award benefits on the grounds that she abandoned suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, this Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation and schedule award benefits effective April 13, 2008 on the grounds that she abandoned suitable work.

FACTUAL HISTORY

On March 14, 2005 appellant, a 38-year-old heavy mobile equipment mechanic, filed a traumatic injury claim alleging that she injured the left side of her body and left shoulder while installing a hood prop shafter. The Office accepted her claim for lumbar sprain/strain; lumbar

radiculitis and aggravation of degenerative disc disease. On November 1, 2005 appellant underwent surgery involving decompression with partial laminectomies at L4, L5 and S1, and foraminectomies at L4-5 and L5-S1 on the left side. The Office paid appropriate medical and compensation benefits.

Appellant was treated by Dr. Pierce Nunley, a Board-certified orthopedic surgeon. On September 25, 2007 Dr. Nunley released appellant to work full time with restrictions, which included: light-duty desk-type work only; no lifting more than 10 pounds repetitively, or more than 20 pounds occasionally; and no bending, stooping or climbing stairs.

On October 15, 2007 the employing establishment offered appellant a limited-duty position as a clerk, which encompassed Dr. Nunley's restrictions. Appellant accepted the light-duty job offer and reported for duty on December 6, 2007.

On January 15, 2008 Dr. Nunley requested authorization for surgery involving L1-2, L2-3, L4-5 and L5-S1 posterior fusion and instrumentation T4-S1. The Office received Dr. Nunley's request on January 18, 2008 and, on February 18, 2008, referred appellant to Dr. James Hood, a Board-certified orthopedic surgeon, for a second opinion examination and an opinion as to whether the requested surgery was medically necessary. On February 21, 2008 appellant stopped working without explanation.

By letter dated March 4, 2008, the Office informed appellant that her cessation of employment was considered an abandonment of her job. It notified her that the clerk position was deemed suitable, based on Dr. Nunley's September 25, 2007 report; that the position remained available; and that she had 30 days to accept the offer or provide written reasons why she believed the position was not suitable. Appellant did not accept the offer or provide an explanation as to why the position was not suitable, within the 30-day period.

By decision dated April 10, 2008, the Office terminated appellant's wage-loss and schedule award benefits, effective April 13, 2008, on the grounds abandonment of her light-duty job constituted a refusal of an offer of suitable work.

On April 16, 2008 appellant requested reconsideration. She submitted an April 11, 2008 report from Dr. Nunley, who indicated that appellant was experiencing pain as a result of walking up and down stairs at work, which was "affecting her life significantly." Dr. Nunley modified appellant's work restrictions to include a 20-hour work week, 4 hours per day.

The record contains an April 22, 2008 second opinion report from Dr. Hood, reflecting that he reviewed the entire medical record and statement of accepted facts. Dr. Hood provided a history of injury and treatment and findings on examination, which revealed limited range of motion in the lumbar spine, and palpable muscle spasm in the lower lumbar region, greater on the left than the right. He opined that appellant was totally disabled from employment, and that she was a candidate for lumbar fusion at L4-5 and L5-S1.

By decision dated May 14, 2008, the Office denied modification of the April 10, 2008 decision terminating appellant's entitlement to compensation benefits, based on her refusal of suitable employment. It reviewed the contents of Dr. Nunley's April 11, 2008 report, stating that he provided no objective basis or material change in appellant's medical condition, other than

her subjective pain complaints and statements that her life was significantly affected as a result of returning to work. The Office did not address Dr. Hood's April 22, 2008 second opinion report.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[1] The Office has authority under section 8106(c)(2) of the Federal Employees' Compensation Act to terminate compensation for any partially disabled employee who refuses or neglects to work after suitable work is offered.[2] To justify termination, the Office must show that the work offered was suitable, that appellant was informed of the consequences of her refusal to accept such employment, and that she was allowed a reasonable period to accept or reject the position or submit evidence or provide reasons why the position is not suitable.[3]

Office regulations provide that, in determining what constitutes "suitable work" for a particular disabled employee, the Office considers the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors.[4] The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence.[5]

Once the Office has demonstrated that the job offered is suitable, the burden shifts to the employee to show that his or her refusal to work is reasonable or justified.[6]

ANALYSIS

The Office terminated appellant's entitlement to compensation benefits, based on her abandonment of suitable employment pursuant to 5 U.S.C. § 8106(c)(2) of the Act. It found that appellant's abandonment of her position effectively constituted refusal to work in the position identified as suitable. The Board finds that the Office did not properly determine that appellant abandoned suitable work.

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[1] *Willa M. Frazier*, 55 ECAB 379 (2004); *see also Roberto Rodriguez*, 50 ECAB 124 (1998).

[2] 5 U.S.C. § 8106(c).

[3] *See Ronald M. Jones*, 52 ECAB 190, 191 (2000); *see also Maggie L. Moore*, 42 ECAB 484, 488 (1991), *reaff'd on recon.*, 43 ECAB 818, 824 (1992). *See also* 20 C.F.R. § 10.516. (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.)

[4] *Rebecca L. Eckert*, 54 ECAB 183 (2002).

[5] 20 C.F.R. § 10.517. *See Kathy E. Murray*, 55 ECAB 288 (2004); *see also Ronald M. Jones, supra* note 3.

[6] *Id.*

Appellant accepted a limited-duty clerk position and reported to duty on December 6, 2007, but stopped working on February 21, 2008, without explanation. She had however on January 18, 2008 submitted a January 15, 2008 report from Dr. Nunley wherein he requested authorization for surgery involving L1-2, L2-3, L4-5 and L5-S1 posterior fusion and instrumentation T4-S1. The Office had then on February 18, 2008 referred appellant to Dr. Hood, a Board-certified orthopedic surgeon, for a second opinion examination as to appellant's current status and an opinion as to whether the requested surgery was medically necessary.

On March 4, 2008 the Office notified appellant that it found the clerk position to be suitable and properly advised her that she had 30 days to accept the offer or provide reasons why she believed the position was not suitable. The Office terminated her compensation and schedule award benefits on April 10, 2008.[7] In terminating her compensation, the Office did not consider Dr. Nunley's request for authorization of surgery, nor did the Office wait to receive a report from Dr. Hood, the second opinion physician, to whom the Office had referred appellant on February 18, 2008. Before terminating compensation for abandonment of suitable work, it is supposed to consider all relevant factors which affect appellant's physical ability to perform the suitable work position.

Furthermore, in its May 14, 2008 decision, the Office acted improperly in not considering all of the medical evidence submitted by appellant before refusing to modify the April 10, 2008 termination decision.

Following her request for reconsideration, appellant submitted new medical evidence, including Dr. Nunley's April 11, 2008 report and Dr. Hood's April 22, 2008 second opinion report. In its May 14, 2008 decision, the Office reviewed and evaluated Dr. Nunley's report, finding it insufficient to warrant modification of its previous decision.

The Office made no reference to Dr. Hood's report although his report was received on April 30, 2008, prior to the issuance of the May 14, 2008 decision. There is nothing in the May 14, 2008 decision, in the form of discussion, suggesting that the Office reviewed or considered Dr. Hood's finding that appellant was in fact both disabled and a candidate for surgery.

The Board finds that the Office acted improperly in not considering the totality of the medical evidence submitted. The Office must review all evidence submitted by a claimant and received by the Office prior to issuance of its final decision.[8]

[7] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4 (October 2005).

[8] *M.M.*, 59 ECAB ___ (Docket No. 07-2103, issued August 26, 2008); *see also Y.A.*, 59 ECAB ___ (Docket No. 08-254, issued September 9, 2008); *William A. Couch*, 41 ECAB 548 (1990).

CONCLUSION

As the Office failed to review all evidence submitted by appellant prior to issuance of its final decision, the Board finds that the Office improperly terminated her compensation benefits effective April 13, 2008 on the grounds that she abandoned suitable work.

ORDER

IT IS HEREBY ORDERED THAT the May 14 and April 10, 2008 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: May 13, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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