United States Department of Labor
Employees' Compensation Appeals Board

C.E., Appellant	)	
and	)	**Docket No. 09-725**
	)	**Issued: November 5, 2009**
DEPARTMENT OF THE ARMY, WILLIAM BEAUMONT ARMY MEDICAL CENTER, El Paso, TX, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 20, 2008 appellant filed an appeal of the February 7 and November 2, 2008 decisions of the Office of Workers' Compensation Programs that terminated her wage-loss compensation on the grounds that she refused an offer of suitable work. She also appealed a July 23, 2008 decision that denied her request for written review of the record. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation benefits on February 7, 2008 pursuant to 5 U.S.C. § 8106(a); and (2) whether the Office properly denied her request for a review of the written record.

FACTUAL HISTORY

On March 4, 2002 appellant, then a 41-year-old food service workers filed a Form CA-2, occupational disease claim, alleging that her employment duties caused carpal tunnel syndrome.

She had stopped work on January 24, 2002. The Office accepted right carpal tunnel syndrome and authorized the surgical release performed on January 24, 2002. Appellant returned to limited duty in late February 2002. On January 22, 2004 she had a left carpal tunnel release, which the Office accepted as employment related. Appellant was placed on the periodic rolls. She returned to light duty for four hours daily on May 3, 2004, five hours daily on June 1, 2004 and then to eight hours of light duty on July 6, 2004, where she continued to work.

By decision dated February 14, 2005, the Office found that appellant's actual earnings as a modified food service worker fairly and reasonably represented her wage-earning capacity. As her current earnings exceeded those when injured, she had no loss in earning capacity.

Appellant stopped work on March 25, 2005 and was returned to the periodic rolls. By report dated October 10, 2005, Dr. Dean E. Smith, a Board-certified orthopedic surgeon, diagnosed displaced cervical disc and the Office accepted a displaced cervical disc and radiculitis. In February 2006, appellant was referred to Dr. Randy J. Pollet, Board-certified in orthopedic surgery, for a second opinion evaluation. In a March 14, 2006 report, he provided findings on physical examination and advised that she should avoid surgery and could return to work. By report dated March 22, 2006, an Office medical adviser advised that additional recommended surgery was warranted. On April 21, 2006 Dr. Smith performed an anterior discectomy at C4-5, C5-6 and C6-7 with interbody fusion.

Dr. Carlos Viesca, Board-certified in anesthesiology, treated appellant for pain management. On June 7, 2007 he performed a trial placement of two cervical electrodes. Dr. Phillip Osborne, an occupational medicine specialist performed a functional capacity evaluation on June 8, 2007 and advised that the study was invalid because appellant did not give proper effort, did not follow instructions and had multiple factors of somatization.

The Office referred appellant to Dr. James F. Hood, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a June 13, 2007 report, Dr. Hood reviewed the medical record, including Dr. Osborne's functional capacity evaluation and appellant's complaints of neck pain. He advised that physical examination of the cervical spine was invalid due to poor effort but noted that her reflexes were normal. There was no atrophy on wrist examination and thumb-to-finger pinch "was fraught with give-way," Dr. Hood opined that appellant could return to light duty with frequent lifting of up to 10 pounds and occasional lifting of 20 pounds. On July 12, 2007 Dr. Viesca implanted two spinal neurostimulator electrodes.

The Office determined that a conflict in medical evidence arose between Drs. Hood and Smith regarding appellant's capacity for work. It referred her to Dr. David R. Willhoite, a Board-certified orthopedic surgeon, for an impartial evaluation. In a July 30, 2007 report, Dr. Willhoite reviewed appellant's medical history and complaint of left arm pain. He noted physical findings of mild tenderness to palpation of the left trapezius muscle and slight restriction of the cervical spine in all directions, moderate weakness of grip in the left hand compared to the right and decreased strength in the left biceps muscle compared to the right with no sensory deficits in the upper extremities. Dr. Willhoite diagnosed postoperative discectomy and plating from C4 to C7 with insertion of a spinal cord stimulator. He advised that appellant's moderate weakness in the left upper extremity prevented her from unrestricted work but that she could return to light work for eight hours daily. In an attached work capacity evaluation,

Dr. Willhoite advised that reaching above the shoulder and repetitive movements of the left wrist should be limited to two hours daily, with lifting limited to 10 pounds, for four hours daily.

In a form report dated August 9, 2007, Dr. Smith checked a box indicating that appellant was totally disabled. Dr. Viesca submitted reports dated September 5 and 27, 2007, in which he noted appellant's complaints of neck and upper extremity pain. He provided findings on examination, diagnosed cervicalgia, cervical radiculopathy, cervical spondylosis, cervical postlaminectomy syndrome and chronic pain syndrome and advised that she was permanently disabled for work. By report dated October 4, 2007, Dr. Smith noted that appellant was under chronic pain management with Dr. Viesca. He advised that she was unable to work and was referred to Dr. Viesca for continued treatment.

On October 24, 2007 appellant elected disability retirement. On October 29, 2007 the employing establishment offered her a sedentary position as an office clerk with a three to five-pound weight restriction. The duties were described as answering the telephone, filing at her own pace and dealing with visitors. Appellant retired on November 15, 2007. On November 16, 2007 she declined the offered position, noting that she had retired. On December 7, 2007 the employing establishment amended the offered position to reflect a three-pound lifting restriction and no reaching above the shoulder.

By letter dated December 19, 2007, the Office advised appellant that the position offered was suitable. Appellant was notified that if she failed to report to work or failed to demonstrate that her failure to return to work was justified, her right to compensation for wage loss or a schedule award would be terminated pursuant to section 8106 of the Federal Employees' Compensation Act.[1] She was given 30 days to respond.

In a December 27, 2007 report, Dr. Viesca noted appellant's complaint of neck and upper extremity pain and advised that her psychological evaluation was positive for chronic pain syndrome. He advised that neck range of motion was improved with stimulation with pain on flexion and extension. Upper extremity pain was much improved. Dr. Viesca diagnosed cervicalgia, cervical radiculopathy, cervical spondylosis and cervical postlaminectomy syndrome and advised that she was permanently disabled.[2] On January 18, 2008 the employing establishment confirmed that the offered position was still available. On January 23, 2008 the Office advised appellant that her reasons given for refusing to accept the offered position were not valid, noting that retirement was not an acceptable reason for refusing to accept a job offer. Appellant was given an additional 15 days to accept the offered position. On January 28, 2008 she submitted a January 2, 2008 report from Dr. Michael K. Boone, a Board-certified physiatrist and associate of Dr. Viesca, who provided an impairment evaluation.[3] On January 29, 2008 appellant telephoned the Office to disagree with the proposed termination and resubmitted

[1] 5 U.S.C. §§ 8101-8193.

[2] An emergency room report dated June 25, 2005 and an anesthesia record from June 7, 2007 were also submitted.

[3] Dr. Boone advised that appellant had a right upper extremity impairment of 13 percent and a left upper extremity of 27 percent.

Dr. Viesca's December 27, 2007 report. On January 31, 2008 the employing establishment confirmed that the offered position remained available.

By decision dated February 7, 2008, the Office terminated appellant's wage-loss compensation and schedule award benefits on the grounds that she declined an offer of suitable work.

On June 4, 2008 appellant requested a review of the written record. By decision dated July 23, 2008, the Office denied the request on the grounds that it was not timely filed.

On August 22, 2008 appellant requested reconsideration and submitted a duplicate of Dr. Viesca's December 27, 2007 report. In a report dated February 28, 2008, Dr. Viesca reiterated his findings and conclusions. On May 1, 2008 he advised that appellant had complaints of low back and lower extremity pain and diagnosed lower back pain syndrome, lumbar radiculopathy and lumbar spondylosis. In a September 11, 2008 report, Dr. Viesca noted appellant's complaint of low back, upper extremity and neck pain and stated that she was retired/disabled. He advised that on examination, range of motion of the neck and lumbar spine was painful. Dr. Viesca diagnosed low back pain syndrome, lumbar radiculopathy, lumbar spondylosis, lumbar spinal canal stenosis and cervicalgia.

By decision dated November 20, 2008, the Office denied modification of the February 7, 2008 decision on the grounds that the medical evidence submitted was insufficient to support that appellant was unable to perform the duties of the offered position.

LEGAL PRECEDENT -- ISSUE 1

Section 8106(c) of the Act provides in pertinent part, "A partially disabled employee who (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[4] It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[5] The implementing regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.[6] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of a refusal to accept such employment.[7] In determining what constitutes "suitable work" for a particular disabled employee, it considers the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to

[4] 5 U.S.C. § 8106(c).

[5] *Joyce M. Doll*, 53 ECAB 790 (2002).

[6] 20 C.F.R. § 10.517(a).

[7] *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

perform such work and other relevant factors.[8] Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.[9] Section 8106(c) will be narrowly construed as it serves as a penalty provision which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[10]

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.[11] It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.[12]

Section 8123(a) of the Act provides that if there is 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.[13] When the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[14]

ANALYSIS -- ISSUE 1

The Office terminated appellant's monetary compensation benefits on February 8, 2008 on the grounds that she refused a December 7, 2007 offer of suitable work. It found that the position was within her physical capabilities based on the July 30, 2007 report of Dr. Willhoite, a Board-certified orthopedic surgeon who performed an impartial evaluation. The Office accorded Dr. Willhoite's opinion special weight as an impartial medical specialist who provided a well-rationalized report based on a complete medical and factual background.

Dr. Willhoite provided findings on examination and advised that appellant could perform eight hours of light duty daily with restrictions limiting reaching above the shoulder and repetitive movements of the left wrist to two hours daily, with lifting limited to 10 pounds, four hours daily. The employing establishment's December 7, 2007 job offer of an office clerk was a sedentary position with a three-pound lifting restriction. Reaching above the shoulder was not required. The Board finds that these restrictions are within the limitations set forth by

[8] 20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB 681 (2004).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5.a(1) (July 1997); *see Lorraine C. Hall*, 51 ECAB 477 (2000).

[10] *Gloria G. Godfrey*, 52 ECAB 486 (2001).

[11] *Gayle Harris*, 52 ECAB 319 (2001).

[12] *Richard P. Cortes*, 56 ECAB 200 (2004).

[13] 5 U.S.C. § 8123(a); *see Geraldine Foster*, 54 ECAB 435 (2003).

[14] *Manuel Gill*, 52 ECAB 282 (2001).

Dr. Willhoite. The position offered appellant on December 7, 2007 was therefore suitable work within her physical limitations.

Following Dr. Willhoite's July 30, 2007 evaluation, appellant submitted additional medical reports from Drs. Smith and Viesca and an impairment evaluation performed by Dr. Boone. The Board, however, finds that these reports are not sufficient to overcome the special weight afforded to Dr. Willhoite. Dr. Boone did not provide an opinion regarding appellant's ability to work. On August 9, 2007 Dr. Smith merely checked a box indicating that she was totally disabled. His October 4, 2007 report noted that appellant was being treated by Dr. Viesca for chronic pain and could not work. A subsequently submitted report of a physician on one side of a resolved conflict of medical opinion is generally insufficient to overcome the weight of the impartial medical specialist or to create a new conflict of medical opinion.[15] The Board finds that Dr. Smith's August 9 and October 4, 2007 reports are insufficient to overcome the weight accorded Dr. Willhoite as an impartial medical specialist. Similarly, Dr. Viesca's reports are insufficient to overcome Dr. Willhoite's evaluation. On September 5 and 27, 2007 he advised that appellant could not work and noted her complaints of chronic pain. On December 27, 2007 and February 28, 2008, Dr. Viesca merely reiterated his findings and conclusions. On May 1, 2008 he discussed her low back condition, not accepted as employment related. On September 11, 2008 Dr. Viesca advised that range of motion of the neck and lumbar spine was painful. In his reports, he did not address why appellant could not perform the sedentary work in the December 7, 2007 job offer or explain why the position offered was not suitable. The Board finds his reports do not address the issue of appellant's capacity to work as a modified office clerk. His reports are of diminished probative value.[16]

Dr. Willhoite reviewed appellant's complete medical history and provided a well-rationalized evaluation in which he clearly advised that appellant could return to light duty. His opinion is entitled to the special weight accorded an impartial examiner and therefore constitutes the weight of the medical evidence.[17] Appellant rejected the offered position, stating that she had retired. Retirement, however, is not considered an acceptable reason for refusing an offer of suitable work.[18] The Board therefore finds that Dr. Willhoite's opinion represents the weight of the medical evidence and established that appellant had the physical ability to perform the duties of the offered position.[19]

In order to properly terminate appellant's compensation under section 8106 of the Act, the Office must provide her notice of its finding that an offered position is suitable and give her an opportunity to accept or provide reasons for declining the position.[20] The record in this case establishes that the Office properly followed the procedural requirements. By letter dated

[15] *Richard O'Brien*, 53 ECAB 234 (2001).

[16] *See S.S.*, 59 ECAB ____ (Docket No. 07-579, issued January 14, 2008).

[17] *See Sharyn D. Bannick*, 54 ECAB 537 (2003).

[18] *Robert P. Mitchell*, 52 ECAB 116 (2000).

[19] *Supra* note 8.

[20] *See Maggie L. Moore*, *supra* note 7.

December 19, 2007, the Office advised appellant that the offered position was suitable. She was notified that if she failed to report to work or failed to demonstrate that the failure was justified, her right to compensation would be terminated. Appellant was allotted 30 days to either accept or provide reasons for refusing the position. On January 23, 2008 the Office advised appellant that the reasons given for not accepting the job offer were unacceptable and she was provided an additional 15 days in which to accept the job offer. She was offered a suitable position by the employing establishment and such offer was refused. Under section 8106 of the Act, her compensation was properly terminated on February 8, 2008 on the grounds that she refused an offer of suitable work.[21]

After the Office established that the offered work is suitable, the burden shifted to appellant to show that her refusal of suitable work was reasonable or justified.[22] In a February 28, 2008 report, Dr. Viesca reiterated his findings and conclusions. In reports dated May 1 and September 11, 2008, he discussed appellant's lower back condition. While Dr. Viesca continued to advise that appellant was totally disabled, his opinion is insufficient to establish that the offered position was unsuitable because he did not address why she could not perform the duties of the modified clerk position.[23]

An employee who refuses or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified.[24] The Board finds that the Office properly terminated appellant's monetary compensation due to her refusal of suitable work and that she did not, thereafter, establish that her refusal of suitable work was justified.

LEGAL PRECEDENT -- ISSUE 2

A claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought. If the request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.[25] The Board has held that the Office, in its broad discretionary authority in the administration of the Act has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[26] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when

[21] *Joyce M. Doll*, *supra* note 5.

[22] *M.S.*, 58 ECAB ____ (Docket No. 06-797, issued January 31, 2007).

[23] *S.S.*, *supra* note 16.

[24] 5 U.S.C. § 8106(c)(2).

[25] *Claudio Vazquez*, 52 ECAB 496 (2001).

[26] *Marilyn F. Wilson*, 52 ECAB 347 (2001).

the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[27]

ANALYSIS -- ISSUE 2

The Office denied appellant's request for a review of the written record on the grounds that it was untimely filed. In the July 23, 2008 decision, it found that she was not entitled to a record review as a matter of right. Appellant's request was dated June 6, 2008 and was not made within 30 days of the February 7, 2008 Office decision. Her request was more than 30 days after the date of the February 7, 2008 decision. The Office properly determined that she was not entitled to a review of the written record as a matter of right as it was untimely filed.[28]

The Office also has the discretionary power to grant a request for a record review when a claimant is not entitled to such as a matter of right. It properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request on the basis that the issue in this case could be addressed through a reconsideration application. The Board has held that as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.[29] The evidence of record does not establish that the Office abused its discretion.

CONCLUSION

The Board finds that the Office properly terminated appellant's wage-loss compensation pursuant to 5 U.S.C. § 8106(a). The Office did not abuse its discretion in denying her request for a review of the written record.[30]

[27] *Claudio Vazquez, supra* note 25.

[28] *Id.*

[29] *See Claudio Vazquez, supra* note 25; *Daniel J. Perea*, 42 ECAB 214 (1990).

[30] The Board notes that appellant submitted evidence with her appeal. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence that was before the Office at the time it issued its final decision. 20 C.F.R. § 501.2(c)(1) (2009).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 2, July 23 and February 7, 2008 are affirmed.

Issued: November 5, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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