United States Department of Labor
Employees' Compensation Appeals Board

L.T., Appellant	)	
and	)	**Docket No. 09-37**
	)	**Issued: September 23, 2009**
U.S. POSTAL SERVICE, POST OFFICE, San Diego, CA, 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 October 8, 2008 appellant filed a timely appeal from the September 23, 2008 decision of the Office of Workers' Compensation Programs finding that she received an overpayment in the amount of $1,016.28 for which she was at fault. Her appeal is also timely filed from a July 16, 2008 decision terminating her compensation for failure to accept suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits of this claim.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation benefits after July 16, 2008 on the grounds that she refused suitable work; (2) whether the Office properly determined that appellant received an overpayment of $1,016.28 for the period July 16 through August 2, 2008; and (3) whether the Office properly determined that appellant was at fault in creating the overpayment of compensation, thereby precluding waiver.

FACTUAL HISTORY

On June 1, 2007 appellant, then a 32-year-old part-time flexible letter carrier, sustained injury when her right foot became caught on a step and she fell, twisting her ankle and landing on her knees. The Office accepted her claim for right ankle sprain and left knee contusion. Appellant stopped work on July 18, 2007 and received compensation benefits for wage loss.

On December 6, 2007 Dr. David L. Flood, a Board-certified orthopedic surgeon, performed an arthroscopy of the left knee with chondroplasty and arthroscopic limited synovectomy. On March 13, 2008 he noted that appellant was making progress following the left knee surgery but she continued to experience pain involving her right knee. On April 24, 2008 appellant underwent surgery on her right ankle including, arthroscopy with debridement of intraarticular adhesions and open exploration of the peroneal tendons above peroneal retinaculum. She also underwent a right knee arthroscopy and arthroscopic chondroplasty of the patella; arthoscopic chondroplasty of the medial femoral condyle; and limited synovectomy and plicectomy. In a May 5, 2008 report, Dr. Flood noted appellant's status as postarthroscopic debridement for chondral lesion of the patella and status post ankle arthroscopy for debridement of scar tissue and tenolysis of peroneal tendon. He requested authorization for physical therapy.

In a work capacity evaluation dated June 3, 2008, Dr. Flood advised that appellant could work six hours a day for two weeks and then begin full-time eight-hour work. He placed restrictions on intermittent sitting for three hours, one hour of walking, three hours of intermittent standing and six hours each for operating a motor vehicle, reaching, twisting and repetitive movement with wrists and elbow. Dr. Flood limited her to pushing/pulling/lifting 10 pounds. He prohibited squatting, kneeling and climbing. Dr. Flood recommended that appellant have 10-minute breaks every 2 hours. He stated that appellant "needs to be able to sit or stand at will." Dr. Flood indicated that these restrictions would last four weeks.

On June 3, 2008 the employing establishment offered appellant a position as a modified carrier and noted that she could use her cane when she delivered mail. Restrictions in the modified assignment were intermittent sitting to drive to each destination (30 minutes), intermittent walking on flat surfaces (1 hour and 15 minutes), intermittent standing (1 hour and 15 minutes) and intermittent lifting of up to 10 pounds which required "breakdown of swings" (2 hours and 30 minutes). In a letter dated June 4, 2008, the employing establishment advised the Office that appellant did not report to work.

On June 5, 2008 Dr. Flood modified the June 3, 2005 work capacity form and indicated that appellant could not operate a motor vehicle to drive to and from work. All other restrictions remained the same.

On June 5, 2008 the employing establishment again made an offer to appellant of modified duty as a letter carrier. Appellant's duties would include scanning certified mail (which could be done sitting) for three hours a day and conducting address searches and completing forms for three hours a day. The physical requirements were noted as sitting 5.5 hours a day, standing and walking 30 minutes a day and lifting continuously one ounce and occasionally up to 10 pounds. The employing establishment noted that she could use a cane and sit or stand as needed for comfort.

By letter dated June 6, 2008, appellant resigned from the employing establishment. She contended that she had been asked to return to work under circumstances that were neither comfortable nor acceptable for her. Appellant maintained that the job offer required her to drive to the downtown office and that she was medically unable to drive and walked with the assistance of a cane.

By letter dated June 9, 2008, the Office informed appellant that it found that the position of modified carrier to be within her work capabilities as prescribed by Dr. Flood. It advised appellant that she had 30 days from the date of the letter to either accept the position or provide an explanation for refusing it. The Office notified her that, if she failed to accept the position or to demonstrate that the failure was justified, her compensation would be terminated. Appellant did not respond to the Office's letter.

In a decision dated July 16, 2008, the Office terminated appellant's compensation effective that date for failure to accept an offer of suitable work pursuant to 5 U.S.C. § 8106(c).

On July 24, 2008 the Office issued a check in the amount of $1,580.88 for compensation from June 8 through July 5, 2008. However, in a form dated July 24, 2008, it noted that appellant's compensation was terminated as of July 16, 2008. The Office determined that she received 18 days of compensation to which she was not eligible in the amount of $1,016.28.

On July 24, 2008 the Office made a preliminary determination that appellant received an overpayment in the amount of $1,016.28 after her compensation was "suspended" because she refused a light-duty job offer. As appellant received compensation for the period July 16 through August 2, 2008, an overpayment was created. The Office found that appellant was at fault in the creation of the overpayment because she knew or should have known that she accepted an incorrect payment to which she was not entitled. It informed appellant of the prerecoupment procedures relevant to the overpayment. Appellant did not respond to the Office's preliminary determination of overpayment.[1]

By decision dated September 23, 2008, the Office finalized its determination that appellant received an overpayment in the amount of $1,016.28. As appellant was at fault in the creation of the overpayment, she was not entitled to a waiver. The Office requested that she forward a check for the full amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

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 him is not entitled to compensation.[2] 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, the Office has the burden of demonstrating that the employee can work,

[1] Appellant did submit further information with regard to her medical condition.

[2] 5 U.S.C. § 8106(c)(2).

setting forth the specific restrictions, if any, on the employee's ability to work and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.[3] 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.[4] Whether an employee has the physical or psychological ability to perform an offered position is primarily a medical question that must be resolved by the medical evidence.[5]

When the Office considers a job to be suitable, it shall advise the employee of its findings and afford her 30 days to either accept the job or present any reasons to counter the Office's finding of suitability.[6] If the employee presents such reasons and the Office determines that the reasons are unacceptable, it will notify the employee of that determination and further inform the employee that she has 15 days in which to accept the offered work without penalty.[7] After providing proper notification, the Office will terminate the employee's entitlement to further compensation.[8] However, the employee remains entitled to medical benefits.[9]

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for right ankle sprain and left knee contusion. Appellant underwent multiple surgeries. On June 2, 2008 Dr. Flood completed a work capacity evaluation which the employing establishment used in offering appellant modified duty within her restrictions. On June 5, 2008 he noted that appellant could not operate a motor vehicle. Appellant did not accept the job offer; rather, she resigned from her position. She indicated that the position required her to drive to the downtown office and that she was medically unable to drive and walked with the assistance of a cane.

On June 9, 2008 the Office informed appellant that it found the position suitable and noted that it remained available. Appellant was provided 30 days from the date of the letter to either accept the position or provide reasons for refusing the position. She did not respond to the Office's proposed termination. Accordingly, the Office terminated compensation benefits.

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits. The position offered by the employing establishment was based on the work restrictions of her attending physician, Dr. Flood. The position noted that appellant would work six hours a day. If she accepted the position, she would be scanning certified mail, a

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

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

[5] *Gayle Harris*, 52 ECAB 319, 321 (2001).

[6] 20 C.F.R. § 10.516.

[7] *Id.*

[8] *Id*. at § 10.517(b).

[9] *Id.*

position which could be done sitting, for three hours a day and conducting address searches and completing forms for three hours a day. The physical requirements were noted as sitting 5.5 hours a day, standing and walking 30 minutes a day and lifting continuously one ounce and occasionally up to 10 pounds. The employing establishment noted that appellant could use her cane and sit or stand as necessary for comfort. On June 5, 2008 Dr. Flood indicated that appellant could work six hours a day but must be able to sit and stand at will. The position offered by the employing establishment was within these restrictions. The position did not require that appellant drive a vehicle during the course of her federal duties.

The Board notes that appellant never responded to the Office's proposed termination of benefits. Appellant did not provide the Office with any response as to why the position was not suitable. The Office properly terminated benefits.[10] Appellant indicated by letter to the employing establishment that she could not perform the offered position because she could not drive to the downtown office. However, she did not establish that she was unable to commute to the work site. There is no information that using alternative methods of transportation were not feasible. Appellant advised her employer that she resigned. Resignation from the employing establishment, like retirement, is not a valid reason for refusing a suitable offer of work.[11]

Appellant did not respond to the Office's proposed termination of benefits. As noted, the position offered by the employing establishment was properly found to be suitable for the work restrictions set by her treating physician. The Office properly terminated appellant's benefits for failure to accept an offer of suitable work pursuant to 5 U.S.C. § 8106(c).

LEGAL PRECEDENT -- ISSUE 2

Section 8102 of the Act provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.[12] When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.[13]

ANALYSIS -- ISSUE 2

The Board finds that the Office has not provided sufficient evidence that appellant received an overpayment in the amount of $1,016.28. The Office found that appellant was overpaid for the period July 16 through August 2, 2008 because she received compensation benefits for this time period and her compensation had been terminated on July 16, 2008.

[10] See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(d)(2) (July 1997). *See also Rosie E. Garner*, 48 ECAB 220 (1996); *Stephen R. Lubin*, 43 ECAB 564 (1992).

[11] *See Robert P. Mitchell*, 52 ECAB 116 (2000) (where the claimant chose to receive disability retirement benefits rather than accept a position offered by the employing establishment).

[12] 5 U.S.C. § 8102(a).

[13] *Id.* at § 8129(a).

However, the supporting documentation of record, a check issued on July 5, 2008 in the amount of $1,580.88, indicates that it was for the period June 8 through July 5, 2008, prior to the July 16, 2008 termination of compensation benefits. Accordingly, the Office failed to submit supporting evidence that appellant received an overpayment after compensation benefits had been terminated. It did not meet its burden of proof in establishing that an overpayment of compensation occurred, as alleged.[14]

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits as of July 16, 2008 on the grounds that she refused suitable work. The Office did not meet its burden of proof to establish that appellant received an overpayment in the amount of $1,016.28.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 16, 2008 is affirmed. However, the Office's decision dated September 23, 2008 finding an overpayment in the amount of $1,016.28 is reversed.

Issued: September 23, 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

[14] *See Robert D. Short*, 44 ECAB 354 (1993) (the Office did not meet its burden to establish fact of overpayment). Given this finding, the Board need not address the issue fault.