United States Department of Labor
Employees' Compensation Appeals Board

S.D., Appellant	)	
and	)	**Docket No. 09-359**
	)	**Issued: September 8, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Newark, NJ, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On November 19, 2008 appellant timely filed an appeal from a November 4, 2008 merit decision of the Office of Workers' Compensation Programs that terminated her compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of her claim.

ISSUE

The issue is whether the Office properly terminated appellant's compensation under 5 U.S.C. § 8106(c)(2) on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On February 25, 2005 appellant, a 54-year-old clerk, filed a traumatic injury claim (Form CA-1) for a back injury. She attributed her injury to picking up trays. By decision dated June 20, 2005, the Office accepted appellant's claim for lumbosacral sprain/strain.

In a work capacity evaluation dated June 16, 2006, Dr. James Lee, a Board-certified surgeon, noted appellant's lumbosacral sprain was an accepted condition and that due to this

condition she could only work four hours per day. He specified work restrictions limiting the amount of sitting to four hours per day. Dr. Lee also noted, in a hand-written note, that the offered modified position was suitable.

In a July 20, 2006 medical note, Dr. Lee reported that appellant had been out of work for over a year and that she continued to experience pain in her lower back.

In an October 10, 2006 note, Dr. Lee reported that the MRI scan of appellant's back revealed that she had L4-5, L5-S1 moderate, bilateral neuroforaminal stenosis. He noted that appellant also had L5-S1 degenerative changes. Dr. Lee opined that appellant was completely and totally disabled.

The Office referred appellant, together with a statement of accepted facts and a list of issues to Dr. Iqbal Ahmad, a Board-certified orthopedic surgeon, for another second opinion evaluation.

On April 4, 2007 the employing establishment offered appellant a modified-duty position as a mail processing clerk. The work hours of the modified position were 4:00 pm to 12:50 am. The position required appellant for intermittent periods during an eight-hour day, to perform letter and flat mail distribution, wall and verify box mail, process SPR's and packages, pouch rack distribution and wand and process accountable-mail and service window customers. The position included restrictions including those pertaining to standing, lifting and other activities. The position required lifting of no more than 15 pounds for one hour per day. Sitting was restricted to four hours per day. Standing and walking were restricted to two hours per day.

By letter dated May 2, 2007, the Office notified appellant that the offered position was suitable and in accordance with her medical limitations as provided by Dr. Ahmad. It noted that appellant had 30 days from the date of this decision to accept the offered position or provide an explanation of the reasons for refusing it. The Office advised appellant that if she failed to accept the offered position and failed to demonstrate that the failure to accept was justified, her compensation would be terminated.

On May 21, 2007 Dr. Lee reported that based on appellant's subjective complaints, his examination of her, as well as x-rays and an MRI scan, she was unable to perform the work duties she has historically performed. He opined that appellant was completely and totally disabled and would not be able to return to the job market. Dr. Lee also noted that appellant was considering retirement. In a work capacity evaluation dated May 22, 2007, he reported that appellant was not able to perform her usual job.

The Office, finding a conflict of medical opinion had arisen between Drs. Lee and Ahmad, referred her, together with an amended statement of accepted facts and a list of questions to Dr. Howard Baruch, Board-certified orthopedic surgeon, for an independent medical examination.

In a July 11, 2007 report, Dr. Baruch diagnosed appellant with low back pain. He noted that based on his physical examination maximum medical improvement had not been reached. Dr. Baruch opined that based on appellant's subjective complaints, she could only tolerate a

light-sedentary job. He reported that appellant was mildly disabled and that her injury was causally related to the dated accident based upon the history he was provided.

By letter dated September 11, 2007, the Office requested Dr. Baruch issue a supplemental clarifying report containing a definite diagnosis and a work capacity evaluation that included any work restrictions he deemed appropriate. On November 8, 2007 it received a work capacity evaluation completed by Dr. Baruch wherein he opined that appellant could work light duty for eight hours per day with restrictions. Dr. Baruch restricted work activities involving sitting to six hours per day. Activities involving walking were restricted to a maximum of one hour per day while activities involving standing were limited to one hour per day.

Appellant submitted several notes signed by Dr. Lee concerning appointments occurring between February and April 2008. In these notes, Dr. Lee reported that she sustained a chronic lumbosacral sprain and was unable to return to work. He also diagnosed ambulatory dysfunction post right total knee arthroplasty.

In a June 7, 2008 work capacity evaluation, Dr. Lee reported that appellant was unable to perform her normal work duties and could not work. He asserted that appellant was completely and totally disabled.

On July 1, 2008 Dr. Lee diagnosed chronic lumbosacral sprain with myofascitis.

By letter dated July 3, 2008, the employing establishment offered appellant a modified limited-duty assignment as a mail processing clerk. The duties performed under the terms of the modified position included: flat case distribution, gathering of flats to be pitched and place on ledge, pitch flats to hold-outs on cases and sweep full hold-outs, place in tubs, label and dispatch. The modified position was provided with restrictions under which appellant was not required to lift more than 10 pounds or reach over her shoulder. The offer limited sitting to six hours per day, walking to two hours per day and standing to one hour per day.

By letter dated July 18, 2008, the Office notified the employing establishment that it had reviewed the position. It noted that the offer was unclear concerning whether appellant would be sitting or standing with each of her given duties. The Office also noted that the referee examiner indicated that appellant should be sitting a maximum of six hours a day and standing for only one. It also found that the offer was unclear how heavy the bundles of flats are that appellant would be required to pitch and place on ledges. The Office requested that the employing establishment submit a letter clarifying the duties with the restrictions or revise the offer and notify it for suitability prior to sending it to appellant.

On July 18, 2008 Dr. Lee opined that appellant was still totally disabled. Appellant's disability aside, he recommended that she attempt to return to work, despite her back pain and ambulatory dysfunction. Dr. Lee opined that there was nothing to gain from her not trying to make an effort to see if she could work. He hoped that appellant would be able to perform limited-duty work.

By letter dated September 12, 2008, the employing establishment responding to the Office's July 18, 2008 letter, reported that the offered position had been slightly modified to include weight limits as it requested. The newly modified light-duty position provided that the

duties with respect to the flats and hold-outs would require lifting no more than 10 pounds. The employing establishment noted that it had seen a major decrease in mail volume due to automation and computer technology and, therefore, the 10-pound limitation was quite reasonable and not hard to accommodate. It requested that the Office review the offer for its suitability before it was sent to appellant.

In a September 17, 2008 letter, the Office notified appellant that it had been informed that the employing establishment had made her a job offer consistent with the physical limitations imposed by her injury. It noted that it had reviewed the offered position, compared it with the medical evidence concerning appellant's ability to work and found the offered position to be suitable. The Office noted that appellant had 30 days from the date of this decision to accept the offered position or provide an explanation of the reasons for refusing it. It also reported that if appellant refused employment or failed to report to work when scheduled, without reasonable cause, her compensation benefits would be terminated, but she would retain her entitlement to medical care. The Office also noted that, if appellant refused the position and elected retirement benefits to which she might be entitled, she should notify the employing establishment to ascertain her eligibility.

On September 19, 2008 appellant rejected the offered position. She asserted that Dr. Baruch stated she could only work part time and, therefore, questioned why the Office did not give her the right hours.

In a note dated September 25, 2008, Dr. Lee reported that appellant had marked pain in her back that radiated into her lower extremities. He noted that there was no history of improvement and that appellant had fallen a few times. Dr. Lee reported that appellant could not really sit for any length of time due to her back and hips and experienced discomfort when trying to bend and load due to paravertebral muscle spasms. He opined that, given appellant's current symptoms, she was not able to return to work for any type of gainful employment.

On October 18, 2008 appellant asserted that she was not capable of performing the offered position. She stated that she had worked the flat cases before and opined that it was not light-duty work and that, if she accepted the position she would be fired because there are days when she is unable to leave her apartment and, therefore, her attendance will be an issue. Appellant also stated that to manage her pain, she takes medication that would render her unfit for duty.

The Office, by letter dated October 17, 2008, notified appellant that the Office's referee physician opined that she could work eight hours each tour and that this opinion held the weight of medical evidence concerning her ability to work. It noted that the position had already been reviewed, found to be suitable and within the restrictions identified by the medical evidence of record. The Office also noted that it had reviewed the evidence appellant submitted and found it insufficient to change its determination. It advised appellant that it would not consider any further reasons justifying her refusal of the offered position. Finally, the Office notified appellant that if she refused the position or failed to report to work when scheduled, her benefits would be terminated within 15 days.

Appellant submitted no additional evidence and did not accept the offered position. By decision dated October 4, 2008, the Office terminated compensation benefits and eligibility for future compensation benefits because she refused to accept suitable employment.[1]

LEGAL PRECEDENT

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, 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]

With respect to the procedural requirements of termination under 5 U.S.C. § 8106(c), the Board has held that the Office must inform appellant of the consequences of refusal to accept suitable work, and allow appellant an opportunity to provide reasons for refusing the offered position.[5] If appellant presents reasons for refusing the offered position, the Office must inform the employee if it finds the reasons inadequate to justify the refusal of the offered position and afford appellant a final opportunity to accept the position.[6]

Office regulations state 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.

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[1] The record reflects appellant submitted additional evidence on appeal. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). *See J.T.*, 59 ECAB ___ (Docket No. 07-1898, issued January 7, 2008) (holding the Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision.) As this evidence was not part of the record when the Office issued either of its previous decisions, the Board may not consider it for the first time as part of appellant's appeal

[2] 5 U.S.C. § 8106(c)(2).

[3] *M.L.*, 57 ECAB 746, 750 (2006)*; Frank J. Sell, Jr.*, 34 ECAB 547, 552 (1983).

[4] *M.L., supra* note 3*; Albert Pineiro*, 51 ECAB 310, 312 (2000).

[5] *Alfred Gomez*, 53 ECAB 149, 150 (2001); *see Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818, 824 (1992).

[6] *Id.*

At that point in time, the Office's notification need not state the reasons for finding that the employee's reasons are not acceptable.[7]

Once the Office advises a claimant that his or her reasons for refusing an offered position are unacceptable and that he or she has 15 days to accept the position or have compensation terminated, the claimant submits further reasons and supporting evidence at his or her own risk. Nevertheless, the Office must consider the reasons and evidence and can then concurrently reject them as unacceptable and terminate compensation.[8]

ANALYSIS

The Board finds that the Office met its burden of proof to terminate compensation for appellant's refusal to accept suitable employment. The evidence of record establishes that the position offered was medically and vocationally suitable and it complied with the procedural requirements of 5 U.S.C. § 8106(c).

In developing the medical evidence, the Office properly determined that a conflict in medical opinion arose as to appellant's ability to work. Dr. Ahmad, the Office's second opinion physician, and Dr. Lee, appellant's attending physician, disagreed concerning her capacity for work.[9]

To resolve this conflict, the Office referred appellant to Dr. Baruch for an independent medical examination. Dr. Baruch reported that appellant was only mildly disabled and diagnosed her with low back pain. He opined that based on appellant's subjective complaints, she could only tolerate a light-sedentary job. Dr. Baruch opined that appellant could perform a full eight-hour light-duty tour with restrictions, no lifting greater than 10 pounds and limitations on the amount of time she spent sitting, maximum of six hours per day, standing, maximum of one hour per day and walking, maximum of two hours per day. The Board finds that his opinion, as the impartial medical specialist, is well rationalized and based on a proper factual and medical background and therefore his opinion is entitled to special weight.[10]

The employing establishment relying on Dr. Baruch's opinion offered appellant a modified position as a modified mail clerk. The modified position was consistent with the medical restrictions established by Dr. Baruch.

The Office properly found that the modified mail clerk position was suitable.

Once the Office has established that a particular position is suitable, 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. The Board has carefully reviewed the evidence and

[7] 20 C.F.R. § 10.516.

[8] *Melvin James*, 55 ECAB 406, 409 (2004); *C.W. Hopkins*, 47 ECAB 725, 727-28 (1996).

[9] *See Geraldine Foster*, 54 ECAB 435 (2003).

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

arguments submitted by appellant in support of her refusal of the modified position and notes that they are not sufficient to justify her refusal of the position.

Appellant argued that she is not physically capable of performing the job and that her returning to work would be pointless because unable to perform the light-duty position, she would be fired. She also asserted that people on light duty at the employing establishment are eventually told that there is not enough mail to keep them and are fired. But the issue of whether appellant is able to perform the offered position is a medical one and must be resolved by probative medical evidence.[11] The Board notes that there is no medical evidence in the record that can overcome the weight of the independent medical adviser.

Further, the Office properly advised appellant that her reasons for refusing the position were not suffiecient and gave her 15 days to accept the position. As appellant failed to accept the position, the Board finds that it properly terminated her compensation benefits effective November 4, 2008.[12]

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation effective November 4, 2008 on the grounds that she refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT November 4, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 8, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

[11] *Kathy E. Murray*, 55 ECAB 288, 290 (2004).

[12] *Supra* note 8.