

U.S.C. § 8106(c) on the grounds that she refused an offer of suitable work.¹ The Board found that the modified position of registered nurse assistant coordinator offered by the employing establishment conformed with the restrictions recommended by Dr. Keola Chun, an attending Board-certified orthopedic surgeon, and Dr. Bunsri T. Sophon, a second opinion Board-certified orthopedic surgeon. The facts of the case as set forth in the Board's prior decision are incorporated by reference.²

On December 20, 2007 appellant, through her attorney, requested reconsideration before the Office contending that the offered position was not suitable. She contended that the duties of the offered position were not fully described and that the employing establishment did not consider the effect of her medication on her ability to perform the modified duties of a nurse assistant coordinator.

In an August 3, 2006 treatment note, Dr. Chun advised that appellant's pain medication would be refilled and that she remained at a permanent and stationary status with regard to work. A progress note advised that appellant had restricted lumbar range of motion with paraspinal tenderness along the area of her healed lumbar incision. Dr. Chun noted that appellant had been offered a position as a nurse assistant coordinator. He stated: "While she has no difficulty with the physical demands of the position, she does not feel able to perform the requisite duties because of the sedative properties of the narcotic medications. This is a justifiable concern and a reasonable explanation for not taking the position." However, in a September 15, 2006 work capacity evaluation form, Dr. Chun advised that there was no reason appellant could not work eight hours a day. He listed physical restrictions based on the fusion of L4-L5. On November 2, 2006 Dr. Chun advised that appellant was cleared for a seven-hour workday. He noted that appellant could take her pain medications during nonoffice hours and Tylenol or Motrin during office hours. Dr. Chun provided work restrictions for a seven-hour workday. In a December 14, 2006 progress report, he noted that appellant had not been accepted back at work because of less than full-time work restrictions and narcotic medication usage.

On January 15, 2007 Dr. Chun noted that appellant had not been accepted back at work. He reiterated that she had restricted lumbar range of motion with tenderness to palpation without evidence of lumbar radiculopathy. Dr. Chun advised that appellant had become symptomatic of her retained spinal hardware and requested authorization for surgery to remove the hardware and explore the fusion mass. On February 8, 2007 the Office authorized the surgery. Appellant underwent surgery on August 16, 2007 by Dr. Gail E. Hopkins, an orthopedic surgeon and associate of Dr. Chun.³

¹ Docket No. 07-143 (issued May 8, 2007). On August 19, 2002 appellant injured her right arm and buttock when she slipped and fell. The Office accepted the claim for contusion of the buttock, lumbosacral strain, lumbar disc herniation, aggravation of trochanteric bursitis and lumbosacral radiculopathy. It authorized lumbar surgery which was performed on May 17, 2004. An L5 laminectomy with bilateral facetectomy and right iliac crest bone graft was performed on August 3, 2004. The Office placed appellant on the periodic rolls in receipt of compensation for total disability as of May 16, 2004.

² On April 28, 2006 the employing establishment offered appellant modified duty full-time position. Appellant rejected the position, contending she was unable to drive to work due to the effects of her medication.

³ During the interim, Dr. Chun submitted a report supporting appellant's application for a disability retirement.

On October 9, 2007 Dr. Hopkins advised that appellant was diagnosed with failed back syndrome with retained hardware. Following surgery, appellant complained of pain she rated as 10 on a scale of 1 to 10 with weakness to both legs. On examination, Dr. Hopkins noted full muscle strength for all groups of the lower extremities, moderate tenderness to palpation, intact sensation in all dermatomes and no pathologic reflexes. She advised that appellant's lumbar range of motion was unchanged. X-rays obtained of the lumbar spine were reported as showing a stable fusion. Dr. Hopkins found that appellant was at maximum medical improvement and was medically retired.

In a March 27, 2008 decision, the Office denied modification of the July 26, 2006 decision terminating appellant's compensation under 5 U.S.C. § 8106. It found that the medical evidence did not support appellant's contention that the effects of her medication disabled her from accepting the offered position.

On August 26, 2008 appellant, through her attorney, requested reconsideration contending that the offered position was not suitable.

In a July 22, 2008 report, Dr. John B. Dorsey, a Board-certified orthopedic surgeon, reviewed appellant's history of injury and medical treatment. He related that, following her spinal fusion surgery, appellant experienced severe pain requiring the use of large doses of narcotics. Following surgery for removal of the hardware on August 16, 2007, appellant had been totally disabled. Dr. Dorsey noted that she stopped work on April 29, 2004 due to pain and her inability to function due to narcotic use. He listed appellant's current complaint of pain as 10 on a scale of 0 to 10, with radiation into both lower extremities. On physical examination, he noted that appellant walked with an antalgic gait, was able to heel and toe gait without evidence of weakness or complaint of pain. Appellant's posture was normal, without evidence of scoliosis, kyphosis, lordosis or listing her leg lengths were equal. She complained of pain to palpation of the parathoracic and paralumbar musculature with no palpable back spasm. Dr. Dorsey set forth findings on range of motion of the spine and advised that straight leg raising was positive on the left at 30 degrees and on the right at 60 degrees. He noted appellant's complaint of decreased sensation in the posterior calves and noted evidence of atrophy in the left thigh. Dr. Dorsey also reviewed a statement by appellant, describing her situation and inability to work.

Dr. Dorsey stated that he reviewed appellant's medical records and diagnosed failed back syndrome. He advised that, at this point, she was not able to engage in gainful employment due to chronic pain and her dependence on narcotics. Dr. Dorsey recommended that appellant be placed in a program to wean her off narcotics before rejoining the work force. He stated that, as long as she took narcotics, they would impair her ability to make decisions and she would pose a danger to herself and others. Dr. Dorsey concluded that appellant was unable to return to her nursing profession since 2005 due to her drug addiction.

In a December 1, 2008 decision, the Office denied modification of its prior decision terminating appellant's compensation under 5 U.S.C. § 8106. It found the medical evidence insufficient to support appellant's contention that the April 2006 job offer was unsuitable due to her medication.

LEGAL PRECEDENT

As the Office met its burden of proof to terminate compensation, the burden of proof shifted to appellant to show that her refusal to work in the offered position was justified.⁴ An employee who refuses or neglects to work after suitable work has been offered or secured for her has the burden of establishing that such refusal or failure to work was justified.⁵

ANALYSIS

The Office accepted that appellant sustained a contusion to the buttocks, lumbosacral strain, lumbar disc herniation, aggravation of trochanteric bursitis and lumbosacral radiculopathy. It authorized lumbar surgery that was performed on August 3, 2004 for an L5 laminectomy with bilateral facetectomy and right iliac crest bone graft, which was performed on August 3, 2004. The Office terminated appellant's wage-loss benefits compensation on July 26, 2006 after she refused an offer of suitable work. In the prior decision, the Board affirmed the Office's determination that appellant refused an offer of suitable work without sufficient reason. With regard to her contention that her medications made her drowsy and unable to drive to work, the Board noted that the reports of Dr. Chun and Dr. Sophon did not establish that appellant was disabled from accepting the offered position due to any impairment based on the effect of her medication. At the time of the termination of benefits, the medical evidence from Dr. Chun had noted appellant's medications for back pain but did not list any impairment due to the effects of her medication. As of January 19, 2006, Dr. Chun listed appellant's examination as stable, refilled her medication and advised that she would be seen in follow-up in six months. On February 13, 2006 Dr. Sophon reviewed the medications taken by appellant and noted that she was alert, well oriented with good memory function with no communication disorder during the examination. He also found that appellant sat comfortably during the examination and was able to ambulate and rise without difficulty.

Because the Office met its burden of proof to terminate appellant's compensation effective July 26, 2006 for refusing an offer of suitable work, it is appellant's burden to establish that her refusal to accept employment was justified at the time offered.⁶ The Board finds that the medical evidence is not sufficient to establish that appellant was disabled in July 2006 from accepting the offered position due to the effects of her medication.

The treatment notes from Dr. Chun do not establish that appellant was unable to accept the offered position due to the effects of her medications. On August 3, 2006 Dr. Chun reiterated that appellant was at a permanent and stationary status and that she had been offered the nurse assistant coordinator position. He noted appellant's belief that she was unable to perform the duties of the position due to the sedative properties of her medication stating: "This is a justifiable concern and a reasonable explanation for not taking the position." This sole statement

⁴ See *M.S.*, 58 ECAB 328 (2007); *Ronald M. Jones*, 52 ECAB 190 (2000).

⁵ *Gloria J. Godfrey*, 52 ECAB 486 (2001); *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.517(a).

⁶ *Supra* note 5.

is not a well-rationalized medical opinion on the issue. There was no discussion by Dr. Chun of the medications taken by appellant, the doses of medications he prescribed or that she took, or how the medications impacted appellant's ability to concentrate or otherwise impaired her from performing the duties of the offered position. Rather, it appears that Dr. Chun based his statement largely on appellant's stated belief that she could not return to work. Moreover, the subsequent reports from Dr. Chun are inconsistent with the opinion that appellant's concern for her medications was a reasonable basis for not accepting the position. On September 15, 2006 Dr. Chun advised that there were no reasons appellant could not work an eight-hour day. On November 2, 2006 he cleared appellant for a return to work for seven hours a day, advising that she could take Tylenol or Motrin during work hours and her prescription medications when she was not working. This medical evidence is not sufficient to establish that the effects of appellant's medications prevented her from accepting the April 28, 2006 job offer.

On July 22, 2008 Dr. Dorsey examined appellant and stated that she had been addicted to narcotic pain medication since 2005. He based his opinion on a history that appellant had experienced severe pain following surgery in 2004 which required large doses of narcotic medication. Dr. Dorsey noted that she was disabled after surgery on August 16, 2007 and remained totally disabled. He noted that appellant had stopped work on April 29, 2004 due to pain and her inability to function due to narcotic use. Although Dr. Dorsey stated that he had reviewed appellant's medical records, he did not specifically address the reports or findings of Dr. Chun or Dr. Sophon contemporaneous to the April 2006 job offer. He did not explain the specific dosages of medication appellant was taking at that time or explain how the medication prescribed by Dr. Chun was otherwise being abused. Rather, it appears that he relied extensively on appellant's own history of having been impaired due to her medications. There is no explanation as to the treatment appellant received in 2006 or why Dr. Chun or Dr. Sophon failed to remark on any such impairment. As noted, the contemporaneous medical records of Drs. Chun and Sophon do not support appellant's disability due to her medication.⁷ This is important, as Dr. Dorsey's report is dated some two years following the job offer and termination. For these reasons, the Board finds that appellant has not established that she was justified in rejecting the April 28, 2006 job offer.

CONCLUSION

The Board finds that appellant has failed to establish that her rejection of the April 28, 2006 job offer was justified.

⁷ The Board has held that contemporaneous evidence is entitled to greater probative value than later evidence. See *Conard Hightower*, 54 ECAB 796 (2003).

ORDER

IT IS HEREBY ORDERED THAT the December 1, 2008 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: April 9, 2010
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