United States Department of Labor
Employees' Compensation Appeals Board

B.S., Appellant	)	
and	)	**Docket No. 09-1067**
	)	**Issued: February 2, 2010**
U.S. POSTAL SERVICE, MONMOUTH PROCESSING & DISTRIBUTION CENTER, Eatontown, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 16, 2009 appellant, through her representative, filed a timely appeal from June 24 and December 23, 2008 merit decisions of the Office of Workers' Compensation Programs terminating compensation benefits for refusing an offer of suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation benefits, effective July 6, 2008 on the grounds that she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c).

On appeal, appellant's representative contends that the proposed offer of employment would require appellant to travel outside the work restrictions provided by her orthopedic surgeon, who limited driving to and from work to four hours a day.

FACTUAL HISTORY

On September 17, 2002 appellant, then a 37-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on August 30, 2002 she experienced back and neck pain while lifting heavy tubs. The Office accepted the claim for exacerbation of cervicobrachial syndrome. Appellant stopped work on September 12, 2002. On January 23, 2003 the Office placed her on the periodic rolls.

On March 7, 2003 appellant underwent an authorized anterior cervical discectomy for neural decompression, interbody arthrodesis and interbody fusion cage at C5-6. On January 6, 2004 she underwent an authorized cervical facet medial branch blockade at C3, C4, C5 and C6 on the right side. Appellant further underwent an authorized implementation of cervical spinal cord stimulation on April 24, 2006.[1]

In medical reports dated February 26, 2004 through April 25, 2005, Dr. Jason Cohen, a Board-certified orthopedic surgeon, opined that appellant was permanently totally disabled due to a C5-6 herniated disc and chronic neck pain.

On May 21, 2007 the Office referred appellant for a second opinion evaluation of her continuing disability and employment-related residuals. In a May 21, 2007 medical report, Dr. Gregory T. Altman, a Board-certified orthopedic surgeon, reviewed appellant's occupational and medical history and described a full physical examination. He reported appellant's complaints of pain radiating down her back, as well as numbness in her right hand and neck pain. Dr. Altman diagnosed failed cervical spine fusion related to the original work injury of August 30, 2002 and subsequent to an anterior cervical discectomy and fusion for a herniated C5-6 disc. He noted radiographic evidence of a failed fusion anteriorly within appellant's medical record. Dr. Altman opined that appellant continued to be disabled from the work injury due to continued pain and weakness in her arm and neck. He recommended a repeat evaluation by a spinal surgeon and potentially a repeat surgical intervention. In an attached work capacity evaluation, Dr. Altman recommended that appellant be placed off of work for six months due to the failed cervical spinal fusion.

In a September 20, 2007 memorandum, the employing establishment's Office of the Inspector General stated that an agent observed appellant performing actions beyond her restrictions both at home and while working at a gas station leased and operated jointly by her and her husband.[2]

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[1] On October 3, 2003 the Office referred appellant to Dr. Robert Dennis, a Board-certified orthopedic surgeon, for a second opinion evaluation. Dr. Dennis diagnosed herniated C5-6 disc and cervical sprain. He opined that appellant was totally disabled due to her employment injury. The Office also referred appellant to Dr. Devendra Kurani, a Board-certified psychiatrist, who did not find any evidence of cognitive or perceptual thought disorder or depression.

[2] By decision dated December 5, 2007, the Office found that appellant forfeited her compensation benefits during the period February 6, 2004 through May 11, 2006 due to her failure to report income earned from the business enterprise. In a June 24, 2008 decision, after a prerecoupment hearing, an Office hearing representative affirmed the forfeiture finding and that appellant was at fault in the overpayment. Appellant's representative appealed this decision to the Board and it was docketed under a separate file number.

On January 15, 2008 the Office referred appellant for a second opinion evaluation. In a January 15, 2008 medical report, Dr. Robert Franklin Draper, Jr., a Board-certified orthopedic surgeon, reviewed appellant's medical history and relayed her complaints that the previous operative procedures did not relieve her pain. After a full physical examination, he diagnosed cervical disc herniation at C5-6, status post anterior cervical discectomy and cervical spinal implants and preexisting degenerative disc bulging at C4-5, C5-6 and C6-7. Dr. Draper opined that appellant had a permanent cervical disc herniation at C5-6 which related to the work injury. He opined that appellant was capable of performing light-duty work in a sedentary position that did not require lifting more than 20 pounds occasionally and 10 pounds frequently. Dr. Draper also totally restricted over-the-shoulder use of the right upper extremity. He noted that there were no limitations with respect to walking, standing or sitting, but that appellant should have 20-minute breaks every 2 hours. Dr. Draper opined that appellant had reached maximum medical improvement and that the work restrictions were permanent.

On February 5, 2008 the Office found that a conflict of medical evidence existed regarding whether appellant was able to return to a light-duty position. It referred appellant for an impartial medical examination to resolve the conflict.

In a March 4, 2008 medical report, Dr. Kevin E. McGovern, a Board-certified orthopedic surgeon, briefly reviewed appellant's medical history and current complaints of neck and right shoulder pain. Physical examination revealed decreased range of motion in her neck with 40 degrees of flexion, 40 degrees of extension, 40 degrees of right rotation, 30 degrees of left rotation and 20 degrees of right and left lateral tilting. Dr. McGovern noted appellant's complaints of neck pain with motion. Grip strength was decreased on the right, measuring 10 on the grip dynamometer compared to 20 on the left with repeat testing. Reflexes were symmetrical and sensation and pulses were intact. X-rays of the cervical spine revealed evidence of cervical fusion at C5-6. Flexion and extension views revealed no evidence of instability but some limitation of the neck was noted. Dr. McGovern diagnosed cervical radiculopathy and cervical herniated disc with status post cervical fusion as a result of the August 30, 2002 work injury. He opined that appellant reached maximum medical improvement and, although she had residuals of her work injury, she was capable of working light or sedentary duty. Dr. McGovern provided work restrictions in an accompanying work capacity evaluation. He indicated that appellant could work an eight-hour day but that she should not walk or stand for more than four hours; reach, twist, squat, kneel or climb for more than two hours; reach above the shoulder, bend or stoop for more than 1 hour or lift more than 20 pounds. Dr. McGovern also restricted appellant's operation of a vehicle, either for driving to and from work or during work, to four hours a day.

By letter dated March 24, 2008, the Office requested that Dr. McGovern clarify whether he reviewed a DVD showing appellant's activities at the gas station and, if not, whether he changed his opinion upon reviewing the DVD.

On March 25, 2008 the Office referred appellant to a vocational rehabilitation counselor.

In an April 1, 2008 note, Dr. McGovern stated that he reviewed the DVD and that it did not change his opinion that appellant was capable of working in a light, sedentary duty on a full-time basis.

In a May 3, 2008 facsimile, the employing establishment requested the Office determine the suitability of an offered modified mail processing clerk position at the Monmouth Processing and Distribution Center located in Eatontown, New Jersey. The position assignments included mail processing and sorting and table work to repair torn and damaged mail. The physical requirements of the position included sitting up to eight hours; standing and walking intermittently up to four hours; reaching, twisting, squatting and kneeling intermittently up to two hours; lifting, pushing and pulling intermittently up to 20 pounds; and reaching above the shoulder, bending and stooping intermittently up to one hour.

By letter dated May 8, 2008, the Office notified appellant that the offered position of modified mail processing clerk with the employing establishment was suitable to appellant's work capabilities. It advised her that she had 30 days to either accept the position or provide reasons justifying refusal, otherwise her wage-loss compensation would be terminated.

On May 12, 2008 appellant stated that she could neither accept nor reject the offered position because she was in the process of contacting her physician to determine whether the job was suitable.

In medical prescription notes dated May 16, 2008, appellant's treating physician, Dr. Charles B. Cresanti-Daknis, a Board-certified anesthesiologist, prescribed a magnetic resonance imaging (MRI) scan of the cervical spine without contrast and stated that appellant was not to work until the workup for the cervical spine was completed. In a medical report with the same date, Dr. Daknis relayed appellant's complaints of severe neck and right upper extremity pain preventing her from functioning on a daily basis. Physical examination did not reveal any changes and he recommended an MRI scan and an electromyogram (EMG) to rule out nerve compression.

By letter dated June 4, 2008, the Office advised appellant that she did not provide a valid reason for refusing the offered position and that she had 15 days to accept the offer or make arrangements to report for employment, otherwise her wage-loss benefits would be terminated.

In a June 18, 2008 letter, the employing establishment stated that appellant reported to the Monmouth Processing and Distribution Center on June 14, 2008 to submit two medical notes from Dr. Daknis dated May 16, 2008. Appellant did not otherwise return to work. In a June 24, 2008 letter, the employing establishment confirmed that the modified-duty job offer remained open and that appellant did not make any arrangements to return to work.

By decision dated June 24, 2008, the Office terminated wage-loss compensation effective July 6, 2008 on the grounds that appellant failed to accept an offer of suitable work. It found that the offered position was within the work restriction provided by Dr. McGovern, who represented the weight of the medical evidence as an impartial medical examiner.

On June 27, 2008 appellant, through her representative, requested an oral hearing before an Office hearing representative.

In a June 16, 2008 prescription note, Dr. Daknis ordered a functional capacity evaluation. A May 23, 2008 EMG and a July 8, 2008 MRI scan were normal with no abnormal findings. In medical reports dated July 21 and September 26, 2008, Dr. Daknis reported appellant's

complaints of neck and right upper extremity pain. He did not note any changes in history or range of motion. Dr. Daknis opined that appellant's condition was a primary myofascial disorder and recommended acupuncture.

In a letter dated June 18, 2008, appellant claimed that she reported to work on June 14, 2008. She went to her supervisor, Steven Berns, to give him a physician's note and inform him of her medical condition. Appellant alleged that Mr. Berns did not allow her to punch in and that her union representative, Glenn Breeds, was present. In a June 14, 2008 statement, Mr. Breeds stated that he was called into Mr. Berns' office to speak with appellant, who was attempting to report to work. Appellant stated that, per her doctor's note, she was not able to work. Mr. Berns stated that appellant could not punch in to work because she needed a return-to-duty clearance.

An oral hearing before an Office hearing representative took place on October 28, 2008, where appellant testified that her husband drove her to the employing establishment on June 14, 2008 but Mr. Berns would not allow her to punch in. She stated that she would have tried to work that day if allowed to punch in. Appellant did not notify anyone at the employing establishment that she was accepting the position or reporting for work that day. She further stated that she did not believe she could work due to chronic pain in her neck and due to her medication. Appellant also testified that the position was located in Eatontown, New Jersey, which was a three-hour drive each way to her home in York, Pennsylvania. Although the offered position was located in the same building as her date-of-injury job, she had moved further away after her injury and the current commute rendered the position unsuitable.

In a November 20, 2008 letter, the employing establishment contested appellant's testimony. It questioned whether appellant intended to return to work on June 14, 2008 in light of the fact that she presented medical documentation indicating she could not work, was driven to the facility by her husband and advised her supervisor she was heavily medicated, apparently indicating that she was not able to work safely in an industrial environment. The employing establishment further challenged appellant's contention that the offered position was not suitable due to the commute. It stated that appellant was still an employee of the Monmouth Processing and Distribution Center and the offered position was within her limitations and in her home facility.

By decision dated December 23, 2008, the Office hearing representative affirmed the termination of benefits on the grounds that appellant refused an offer of suitable work. He found that the weight of the medical evidence rested with Dr. McGovern, who determined that appellant could perform a full-time, light-duty position. The Office hearing representative determined that the employing establishment offered appellant a suitable position, within her physical restrictions, which appellant then refused. Although appellant went to the employing establishment on June 14, 2008, she did not intend to report for duty.

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees' Compensation Act[3] 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 her is not entitled to compensation.[4] 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.[5] 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.[6]

Section 8123(a) of the Act provides that, if there is a 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.[7] The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[8] Where there exists opposing medical reports of virtually equal weight and rationale, and 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 upon a proper factual background, must be given special weight.[9]

ANALYSIS

The issue is whether the Office properly terminated appellant's compensation benefits for refusal to accept suitable work. The Board finds that the Office did not meet its burden of proof in terminating benefits.

Appellant stopped working on September 3, 2002 due to a work-related exacerbation of cervicobrachial syndrome. The Office referred appellant to Dr. Altman for a second opinion regarding her continuing disability. In a May 21, 2007 medical report, Dr. Altman opined that

[3] 5 U.S.C. §§ 8101-8193.

[4] *Id.* at § 8106(c).

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

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

[7] 5 U.S.C. § 8123(a).

[8] 20 C.F.R. § 10.321.

[9] *David W. Pickett*, 54 ECAB 272 (2002).

appellant continued to be disabled from work due to a failed cervical spine fusion related to her employment injury. The Office subsequently referred appellant to Dr. Draper for another second opinion evaluation. In a December 5, 2007 medical report, Dr. Draper found that appellant could return to light duty and provided work restrictions.

The Office properly found that a conflict of medical opinion existed regarding whether appellant could return to a light-duty position.[10] It then referred appellant to Dr. McGovern for an impartial medical evaluation to resolve the conflict.

In a March 4, 2008 medical report, Dr. McGovern reviewed appellant's medical history and described a full physical examination of her neck and upper extremities. He reported her complaints of neck and right shoulder pain. Dr. McGovern diagnosed cervical radiculopathy and cervical herniated disc with status post cervical fusion. He opined that, although appellant still had residuals from her employment injury, she was capable of working light or sedentary duty. Dr. McGovern provided work restrictions limiting appellant's walking or standing to four hours; reaching, twisting, squatting, kneeling or climbing to two hours; reaching above the shoulder, bending or stooping to one hour; and lifting to 20 pounds. He also indicated that appellant should not drive a vehicle either to or from work or during work for more than four hours a day.

The Board finds that Dr. McGovern provided a complete and rationalized opinion, based on an accurate factual and medical background. As such, the doctor's opinion, that appellant could return to light duty, is accorded special weight due to his status as an impartial medical examiner.[11] Appellant did not submit sufficient medical evidence to establish that she could not return to light duty within Dr. McGovern's restrictions. Although she subsequently submitted several prescription and medical notes from Dr. Daknis, none of these documents contain a rationalized opinion that appellant continued to be totally disabled due to her employment injury.[12] Thus, Dr. McGovern's medical opinion constitutes the weight of the medical evidence.

Subsequently, the employing establishment offered appellant a light-duty position as a modified mail processing clerk at the Monmouth Processing and Distribution Center in Eatontown, New Jersey, where she worked prior to her injury. The physical requirements for the position included sitting up to eight hours; standing and walking up to four hours; reaching, twisting, squatting and kneeling up to two hours; lifting, pushing and pulling up to 20 pounds; and reaching above the shoulder, bending and stooping up to one hour.

The Board finds that the physical requirements of the offered position fall within appellant's work restrictions, however, the commute renders the position unsuitable. An acceptable reason, if supported by medical evidence, for refusing an offer of suitable work is inability to travel to work.[13] The Office's procedures provide that the inability to travel to work

[10] *See R.H.*, 59 ECAB ___ (Docket No. 07-2124, issued March 7, 2008).

[11] *See L.W.*, 59 ECAB ___ (Docket No. 07-1346, issued April 23, 2008).

[12] *See Jaja K. Asaramo*, 55 ECAB 200 (2004).

[13] *Mary E. Woodard*, 57 ECAB 211 (2005).

is an acceptable reason if the inability is because of residuals of the employment injury.[14] At the oral hearing, appellant testified that after her injury she relocated to York, Pennsylvania. She claimed that the commute to Eatontown, New Jersey from her home was a three-hour drive both ways, or six hours roundtrip. The length of appellant's commute remains unrefuted by the employing establishment. As Dr. McGovern limited appellant's driving to and from work to four hours a day, the Board finds that the six-hour commute required by the offered position is beyond appellant's work restrictions.

The Board notes that the Act's implementing regulations provide that an employer should offer suitable reemployment in the location where the employee currently resides. If this is not practical, the employer may offer suitable reemployment at the employee's former duty station or other location.[15] In the similar case of *Sharon L. Dean*,[16] the Board found that an offer of employment in Utica, New York, located near appellant's date-of-injury job, was not suitable, as appellant had moved to Fort Myers, Florida, subsequent to her injury. The Office failed to develop the issue of whether suitable reemployment in or around Fort Myers, Florida, was possible or practical, thus, committing reversible error. In the present case, there is no evidence of record to show that the Office developed the issue of whether appellant could be placed in a position located near her home in York, Pennsylvania. Therefore, the Board finds it did not meet its burden of proof in terminating appellant's compensation benefits for failure to accept suitable work.

CONCLUSION

The Board finds that the Office did not properly terminate appellant's compensation benefits effective July 6, 2008 on the grounds that she refused an offer of suitable work.

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(5) (July 1996).

[15] 20 C.F.R. § 10.508.

[16] 56 ECAB 175 (2004).

ORDER

IT IS HEREBY ORDERED THAT the December 23 and June 24, 2008 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: February 2, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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