United States Department of Labor
Employees' Compensation Appeals Board

C.G., Appellant	)	
and	)	**Docket No. 09-247**
	)	**Issued: January 26, 2010**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Ogden, UT, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for appellant
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 3, 2008 appellant filed a timely appeal from the October 2, 2008 merit decision of the Office of Workers' Compensation Programs which affirmed the termination of her wage-loss benefits on the grounds that she abandoned suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation effective March 5, 2008 on the grounds that she abandoned suitable work.

FACTUAL HISTORY

On September 14, 2006 appellant, then a 45-year-old computer technician, filed an occupational disease claim alleging that she sustained a cervical disc protrusion on the right side due to her federal employment. Her work duties included lifting and carrying trays weighing up to 50 pounds while twisting and bending to machinery and pallets, and pulling and pushing cages weighing up to 1,500 pounds. Appellant first realized her condition was caused or aggravated by

her employment on August 11, 2006. She commenced full-time limited-duty as a computer operator. The Office accepted appellant's claim for an aggravated cervical strain.

On December 11, 2006 Dr. Corey Anden, a Board-certified physiatrist, noted appellant's treatment for neck pain radiating to the right arm with moderate degenerative changes in the cervical spine. He advised that appellant could work eight hours a day at modified duty. On January 12, 2007 Dr. Anden diagnosed right C7 nerve root irritation secondary to the moderate cervical disc osteophyte complexes. He noted that appellant's employment involved repetitive heavy lifting at and above the shoulder and head levels. Dr. Anden stated that appellant's work activities contributed to her cervical degenerative changes and disc protrusion. Appellant also had evidence of age-related cervical degenerative changes with permanent aggravation attributed to the repetitive lifting at work. Dr. Anden reiterated that appellant could work eight hours a day performing light-level work with maximum lifting up to 20 pounds and repetitive lifting up to 15 pounds, avoiding overhead lifting and reaching or awkward sustained neck postures in extension or rotation. The restrictions were noted as permanent. Appellant was being treated conservatively and surgery had not been ruled out.

In an April 23, 2007 report, Dr. A. Creig MacArthur, a Board-certified orthopedic surgeon and Office referral physician, diagnosed a repetitive motion-type syndrome of the cervical spine with musculoligamentous neck discomfort and minor cervical spondylosis. He found that appellant's symptoms were related to the type of repetitive work she performed as well as to normal wear and tear from aging. Dr. MacArthur opined that, while appellant sustained some degree of aggravation of her preexisting condition, the aggravation was temporary. With good posture, rest periods, exercise and physical therapy, appellant would return to her preinjury status. Dr. MacArthur advised that diagnostic testing revealed minimal findings and that appellant functioned well enough not to require permanent restrictions. In a work capacity evaluation form, he opined that appellant could work eight hours a day without restrictions.

In a July 13, 2007 report, Dr. Anden stated that appellant had reached maximum medical improvement and that her cervical condition was not expected to have any significant further improvement.

On July 17, 2007 the Office found a conflict in medical opinion between Dr. Anden and Dr. MacArthur as to whether appellant's preexisting cervical disc disease had been permanently aggravated by her employment and the work restrictions under which she could perform full-time employment. It referred appellant, together with a statement of accepted facts, a list of questions and the medical record, to Dr. Dewey MacKay, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

In a September 20, 2007 report, Dr. MacKay reviewed the history of employment and appellant's medical treatment. On examination, he provided findings on cervical range of motion and strength testing of the upper extremities. Diagnostic studies showed a broad-based disc protrusion at C5-6 with foraminal narrowing on the right at C6-7 which Dr. MacKay characterized as significant. He diagnosed repetitive overuse of the right upper extremity and trapezius muscle and cervical spine and degenerative disc disease of the lower levels of the cervical spine. Dr. MacKay noted that appellant was presently working full time at a job in

which the job requirements were lighter than her original job, which required lifting up to 50 pounds. He stated that she could not tolerate this due to her degenerative disc disease, positive findings on examination and difficulties with her shoulder. Dr. MacKay stated that appellant had moderate degenerative disc disease at C5-6 and C6-7 and he found that the restrictions recommended by Dr. Anden were appropriate. He noted that the exact amount of weight she could lift could be more objectively determined by a functional capacity test but was significantly less than 50 pounds. Dr. MacKay completed a work capacity evaluation, finding that appellant could work eight hours a day with permanent restrictions on reaching and reaching above the shoulder no more than one hour per day with pushing, pulling and lifting no more than two hours per day a maximum of 10 pounds.

On December 20, 2007 the employing establishment noted that appellant was not able to continue working in her present positions. It advised that, based on her medical restrictions, one of three positions was available to her including that of tax examining technician.[1] The employing establishment enclosed an acceptance-declination form which it requested she return in five days. Appellant accepted the position on December 28, 2007 and started work on January 7, 2008.[2] The record reflects that she retired on disability on February 2, 2008.

In a February 1, 2008 letter, the Office accepted that appellant sustained a permanent aggravation of a displaced cervical disc without myelopathy. On that same day, however, it also advised her that the she had effectively abandoned the tax examining technician position when her disability retirement became effective. The Office stated that the duties and physical requirements of the position were described in the enclosed job offer which were reviewed and found suitable in accordance with the restrictions specified by Dr. MacKay. It was also noted that the employing establishment confirmed that the position remained available. Appellant was advised that she was to report for duty or provide an explanation for refusing the job within 30 days. If she failed to report to the offered position and failed to demonstrate that such failure was justified, her compensation would be terminated.

On February 8, 2008 appellant noted concerns pertaining to the tax examining technician position and her background qualifications. She stated that she was required to read manuals eight hours a day, which hurt her neck as it was in the same extended down position. Appellant was unable to rest her upper extremities on the chairs, which had arms swiveling in and out. When she was not reading, she worked on the computer. Appellant was unable to focus due to pain in her neck, shoulder and arms.

On February 20, 2008 Dr. MacKay noted that he had originally seen appellant for an impartial medical examination and that she returned to his office as she needed new work restrictions. He stated that appellant was working as a tax examiner and not doing well. Dr. MacKay reiterated his diagnosis of repetitive overuse of the right upper extremity and trapezius

[1] The employing establishment enclosed a standard position description for the tax examining technician setting forth the duties of the position. The Board notes that the form provides no description of the physical requirements of the position other than stating: "Work is performed in an office setting, but may require repetitive arm and hand motion, extended sitting, or light lifting, or reading from a CRT screen."

[2] The record reflects that appellant was involved in a nonemployment-related automobile accident on January 9, 2008.

muscle and cervical spine and degenerative disc disease of the lower levels of the cervical spine. He recommended that she be returned to her previous limited-duty position. In a work capacity form, Dr. MacKay stated that appellant's trial work as a tax examiner failed as it aggravated her shoulder, upper extremities and cervical degenerative disc disease. He specified permanent restrictions with no reaching, reaching above the shoulder, twisting, bending or stooping. Dr. MacKay allowed no repetitive movements of the wrists or elbows, squatting, kneeling or climbing. He also advised appellant could only push, pull or lift no more than 10 pounds for one hour per day. Dr. MacKay found that she could push, pull or lift no more than 10 pounds a day for one hour.

In a March 10, 2008 letter, the Office requested that Dr. MacKay further address appellant's capacity for work. It stated that the tax examining technician position she accepted on January 7, 2008 was based on his September 20, 2007 work restrictions and that she had retired effective February 2, 2008. The Office noted that the February 20, 2008 restrictions were more prohibitive and that he should address whether there was a material worsening in her accepted condition to support the most recent work restrictions or whether her condition was worse due to the nonwork-related automobile accident of January 9, 2008. A copy of the tax examining technician position was provided.

On March 17, 2008 Dr. MacKay noted that, when seen on February 20, 2008, it was his understanding that appellant had been referred back by the Office. He enclosed his clinical records, noting that he had previously advised that she be returned to her prior limited-duty position. Dr. MacKay noted that he modified appellant's work restrictions in an effort to help her keep working. He noted that she had not informed him of her retirement. Rather, appellant noted that if she could go back to her former job she could continue to work eight hours a day.

On March 26, 2008 the Office terminated appellant's wage-loss compensation effective March 5, 2008 on the grounds that she abandoned suitable employment. It found appellant did not provide sufficient justification for abandoning the tax examining position and the employing establishment verified on March 3, 2008 that her refusal continued and the position remained available. The Office found that, although Dr. MacKay changed her work restrictions, he did not provide any medical rationale to support a material worsening or her accepted cervical condition or address whether any change was due to the January 9, 2008 nonwork-related accident.

On March 29, 2008 appellant, through her attorney, requested a telephonic hearing before an Office hearing representative which was held July 14, 2008. Subsequent to the hearing, the Office received a time line of events prepared by appellant.

In an October 2, 2008 decision, the Office hearing representative affirmed the termination of appellant's compensation on the grounds she abandoned suitable work.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides at section 8106(c)(2) that a partially disabled employee who refuses or neglects to work after suitable work is offered is not entitled to

compensation.[3] Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits under section 8106 for refusing to accept or neglecting to perform suitable work.[4] The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to future wage-loss compensation and, for this reason, will be narrowly construed.[5]

To establish that a claimant has abandoned suitable work, the Office must substantiate that the position offered was consistent with the employee's physical limitations and that the reasons offered for stopping work were unjustified.[6] 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 the medical evidence of record.[7]

Section 10.516 of the Code of Federal Regulations states that the Office will advise the employee that the work offered is suitable and provides 30 days for the employee to accept the job or present any reasons to counter its finding of suitability.[8] Before terminating compensation, it must review the employee's proffered reasons for refusing or neglecting to work.[9] If the employee presents such reasons and the Office finds them unreasonable it will offer the employee an additional 15 days to accept the job without penalty. The Board has held that, in cases where compensation is terminated pursuant to section 8106(c), the essential requirements of due process, notice and an opportunity to respond apply not only where an employee refuses suitable work, but also apply in the same force to cases where an employee abandons suitable work.[10]

ANALYSIS

The Board finds that the Office failed to meet its burden of proof to terminate appellant's wage-loss compensation based on the finding that she abandoned suitable work. There are several errors arising in this case.

In developing the medical evidence, the Office determined that a conflict in medical opinion arose regarding appellant's degenerative condition and her capacity for work. It properly referred appellant to Dr. MacKay for an impartial medical examination. Dr. MacKay reported on appellant's condition, noting that her degenerative cervical disease was aggravated by her employment and that he sided with Dr. Anden. He provided work restrictions on

[3] 5 U.S.C. § 8106(c)(2).

[4] *See Bryant F. Blackmon*, 56 ECAB 752 (2005); *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

[5] *See Richard P. Cortes*, 56 ECAB 201 (2004); *H. Adrian Osborne*, 48 ECAB 556 (1997).

[6] *See Wayne E. Boyd*, 49 ECAB 202 (1997).

[7] *See John E. Lemker*, 45 ECAB 258 (1993); *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

[8] 20 C.F.R. § 10.516.

[9] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff d on recon.*, 43 ECAB 818 (1992).

[10] *Mary A. Howard*, 45 ECAB 646 (1994).

September 20, 2007 based on appellant's moderate degenerative disc disease at C5-6 and C6-7. Appellant could work eight hours a day with permanent restrictions on reaching or reaching above the shoulder no more than one hour per day and pushing, pulling and lifting no more than two hours per day with a maximum lifting restriction of 10 pounds.

The employing establishment subsequently offered appellant modified duty as a tax examining technician, stating that the position was based on the work restrictions specified by Dr. MacKay. The Office also stated that it found the work restrictions to be in conformance to the work limitations of the impartial specialist. However, the only job description of record is the "standard position description" provided by the employing establishment. The Office does not address in any manner how the work appellant was to perform had been modified to reflect the limitations set by Dr. MacKay. There is no explanation from the employer as to how the standard position description for a tax examining technician took into account appellant's specific work restrictions. The Office does not describe how any duties requiring reaching or reaching above shoulder level were modified to no more than one hour a day; how pushing, pulling or lifting was limited to two hours a day; or address in any fashion the limitation on lifting no more than 10 pounds. It is elementary that, before termination based on an offer of suitable work, the Office must obtain a description from the employer of how the selected position conforms to the medical restrictions of the injured employee.[11] There is no description of any of the physical duties to be performed, any specific physical requirements of the position or any special demands of the workload or unusual working conditions. The silence of the job description speaks volumes in this case and warrants reversal given the narrow construction on review.

Moreover, the Office failed to comply with its own procedural requirements in terminating appellant's benefits under section 8106. It provided only a 30-day notice on February 1, 2008, the day prior to appellant's effective retirement on disability.[12] Following correspondence with Dr. MacKay pertaining to the modified work restrictions of February 2008, the Office terminated wage-loss benefits on March 26, 2008 without advising appellant that her reasons were unacceptable or that she had 15 days to accept the position.[13] The Office did not comply with the proper notice requirements prior to termination.

For these reasons, the Office improperly terminated appellant's compensation benefits effective March 5, 2008 on the grounds that she abandoned suitable work.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to establish that appellant abandoned suitable work.

[11] *See Marie Fryer*, 50 ECAB 190 (1998).

[12] The Office did not explain how it could find a prospective abandonment of the position.

[13] *See Kenneth R. Love*, 50 ECAB 193 (1998).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated October 2, 2008 be reversed.

Issued: January 26, 2010
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