United States Department of Labor
Employees' Compensation Appeals Board

P.B., Appellant	)	
and	)	**Docket No. 09-2055**
	)	**Issued: June 4, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Bardstown, KY, 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
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 10, 2009 appellant filed an appeal from a July 2, 2009 decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation benefits effective February 17, 2008 pursuant to 5 U.S.C. § 8106(c) on the grounds that she refused an offer of suitable work.

On appeal, appellant asserts that the weight of medical opinion is represented by her attending family physician.

FACTUAL HISTORY

On May 25, 2005 appellant, then a 58-year-old rural carrier, injured her left shoulder when she slipped and fell at work. She stopped work that day and returned to limited duty on May 31, 2005. The Office accepted sprain/strain of the left shoulder, right wrist and neck,

contusion to the right knee and displacement of cervical disc at C5-7 and complete rupture of the left rotator cuff. Appellant began working four hours daily on July 9, 2005 and received compensation for four hours a day. She stopped work October 7, 2005 and was placed on the periodic rolls.

On December 16, 2005 Dr. Patrick P. Han, a Board-certified neurosurgeon, performed anterior discectomies at C5-6 and C6-7. On April 21, 2006 Dr. Cyna Khalily, Board-certified in orthopedic surgery, performed left shoulder arthroscopic rotator cuff repair and left shoulder manipulation. On March 5, 2007 Dr. John R. Johnson, a Board-certified orthopedist, performed a posterior fusion at C6-7. In an October 23, 2007 report, he advised that the fusion showed good position and alignment and that appellant should return in five months.

In October 2007, the Office referred appellant to Dr. Richard T. Sheridan, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a November 13, 2007 report, Dr. Sheridan reviewed the medical records and provided findings physical on examination. He advised that the accepted left shoulder and cervical spine conditions remained active and that appellant could not return to her date-of-injury position as a rural carrier; however, she could perform modified duty for eight hours a day. In an attached work capacity evaluation, Dr. Sheridan advised that she could work eight hours of modified duty with no walking, standing, reaching, reaching above the left shoulder, twisting, bending, stooping, operating a motor vehicle and no repetitive movements of the wrists or elbows. Pushing, pulling and lifting were limited to 10 pounds and she should be allowed breaks.

On November 16, 2007 Dr. Todd W. Vitaz, an attending Board-certified neurosurgeon, noted that appellant was still having significant problems with decreased range of motion and pain in the right shoulder. He advised that she was unable to return to work and stated that the only type job she could do would be sitting at a desk and be allowed to get up and move around on a regular basis "and even to do that would really be pushing things."

The Office determined that a conflict in medical opinion on arose between Dr. Sheridan and Dr. Vitaz as to whether appellant was partially or totally disabled and residuals of the accepted condition. On March 4, 2008 it referred her to Dr. Michael M. Best, an orthopedic surgeon, for an impartial evaluation. The record contains an Office form listing physicians contacted from Physician Directory System (PDS) and pages from a 2007 National Directory of Medical Examiners including Dr. Best's listing. A functional capacity evaluation (FCE) on March 17, 2008 indicated that appellant was unable to complete some tests due to complaint of pain in the left hand, arm, shoulder and neck area and that she had pain during all tests. By report dated March 17, 2008, Dr. Best noted the history of injury, his review of the record and the FCE and appellant's complaint of neck and shoulder pain. He set forth findings on physical examination findings of the neck, shoulder and upper extremities and found that she was at maximum medical improvement. Dr. Best concluded that appellant could not return to her regular rural carrier position but could work in a sedentary to light-duty capacity position. In a March 20, 2008 work capacity evaluation, he advised that appellant could work eight hours a day with permanent restrictions that she not reach above the shoulder or push, pull or lift greater than 20 pounds.

On May 2, 2008 the employing establishment offered appellant a modified position that she refused. Dr. Best submitted supplementary reports dated May 28 and 29, 2008 and on July 28, 2008 the employing establishment modified the job offer to agree with his restrictions. Appellant informed the employing establishment that she neither accepted nor refused the job and by letter dated September 15, 2008, Dr. Best advised that she was fully capable of performing the duties of the offered position.

Appellant retired on disability effective September 15, 2008. On September 22, 2008 the Office ascertained that the offered position was still available and by letter dated September 30, 2008, advised appellant that the position offered was suitable. Appellant was notified that, if she failed to report to work or failed to demonstrate that the failure was justified, pursuant to section 8106 of the Federal Employees' Compensation Act,[1] her right to compensation for wage loss or a schedule award would be terminated. She was given 30 days to respond. On October 7, 2008 appellant elected civil service retirement, effective October 30, 2008. By letter dated October 28, 2008, appellant's representative argued that the offer was not suitable because she had a subsequently acquired low back condition and submitted supportive medical evidence including an August 25, 2008 report in which Dr. Jonas Hurley, an osteopath Board-certified in family medicine, advised that appellant was his patient and permanently disabled due to chronic back pain.

On November 7, 2008 the Office advised appellant that the reasons given for refusing to accept the offered position were not valid. Appellant was given an additional 15 days to accept the offered position. By decision dated November 26, 2008, the Office credited the referee opinion of Dr. Best and terminated her wage-loss compensation and schedule award compensation benefits, effective November 22, 2008, on the grounds that she declined an offer of suitable work. On February 7, 2009 appellant filed a schedule award claim and on May 11, 2009, through her representative, requested reconsideration. She submitted an April 22, 2009 report in which Dr. Hurley advised that she had been his patient since September 28, 2008 and had significant cervical spine disease, a rotator cuff tear and lumbar degenerative disc disease with radiculopathy. Dr. Hurley opined that, due to these significant musculoskeletal pathologies, it would cause physiological stress and significant pain for appellant to stand six to seven hours daily. By decision dated July 2, 2009, the Office denied modification of the November 26, 2008 decision.

LEGAL PRECEDENT

Section 8106(c) of the Act provides in pertinent part, "A partially disabled employee who (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[2] It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[3] The implementing regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured

[1] 5 U.S.C. §§ 8101-8193.

[2] *Id*. at § 8106(c).

[3] *Joyce M. Doll*, 53 ECAB 790 (2002).

for the employee has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.[4] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[5] In determining what constitutes "suitable work" for a particular disabled employee, the Office considers the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors.[6] Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.[7] Section 8106(c) will be narrowly construed as it serves as a penalty provision which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[8] It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.[9]

Section 8123(a) of the Act provides that, if there is 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.[10] When 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 on a proper factual background, must be given special weight.[11]

Office procedures contemplate that impartial medical specialists will be selected from Board-certified specialists in the appropriate geographical area on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and the Office.[12] The procedures provide that the selection of referee physicians (impartial medical specialists) is made through a strict rotational system using appropriate medical directories. The procedures provide that the PDS should be used for this purpose wherever possible.[13] The PDS

[4] 20 C.F.R. § 10.517(a).

[5] *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *aff'd on recon.*, 43 ECAB 818 (1992).

[6] 20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB 681 (2004).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5.a(1) (July 1997); *see Lorraine C. Hall*, 51 ECAB 477 (2000).

[8] *Gloria G. Godfrey*, 52 ECAB 486 (2001).

[9] *Richard P. Cortes*, 56 ECAB 200 (2004).

[10] 5 U.S.C. § 8123(a); *see Geraldine Foster*, 54 ECAB 435 (2003).

[11] *Manuel Gill*, 52 ECAB 282 (2001).

[12] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4b (May 2003); *B.P.*, 60 ECAB ____ (Docket No. 08-1457, issued February 2, 2009).

[13] *Id*.

is a set of stand-alone software programs designed to support the scheduling of second opinion and referee examinations. The PDS database of physicians is obtained from the American Board of Medical Specialties (ABMS), which contains the names of physicians who are Board-certified in certain specialties.[14]

ANALYSIS

In this case, the Office found that a conflict in the medical evidence was created regarding the nature and extent of appellant's continuing employment-related disability. An attending neurosurgeon, Dr. Vitaz, advised that she remained totally disabled and an Office referral physician, Dr. Sheridan, advised that she could return to modified duty for eight hours daily. The Office referred appellant to Dr. Best who was designated an impartial physician.

The Board finds that the Office improperly selected Dr. Best to perform the impartial evaluation. Dr. Best indicated that he is an orthopedic surgeon; however, he does not appear on the electronic ABMS database of Board-certified physicians as Board certified in any medical specialty. While Office procedures state that a physician who is not Board certified may be used if the physician has special qualifications for performing the examination,[15] such reasoning must be documented in the case record. There is no evidence of record before the Board to establish that Dr. Best was selected for any special qualifications that might exempt him from the requirement that he be Board certified. Therefore, Dr. Best was not properly selected as a referee physician and his report cannot resolve the conflict in medical evidence. The Office did not meet its burden of proof to terminate appellant's compensation on the grounds that she refused an offer of suitable employment.[16]

CONCLUSION

The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits on the grounds that she refused an offer of suitable work.

[14] Federal (FECA) Procedure Manual, *supra* note 12, Chapter 3.500.7 (May 2003); *B.P., supra* note 12.

[15] *Id*. at Chapter 3.500.4(b)(1).

[16] *Fred Simpson*, 53 ECAB 768 (2002).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 2, 2009 be reversed

Issued: June 4, 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