United States Department of Labor
Employees' Compensation Appeals Board

M.S., Appellant	)	
and	)	**Docket No. 10-736**
	)	**Issued: January 26, 2011**
DEPARTMENT OF THE ARMY, COMMAND SAFETY OFFICE, Fort Drum, NY, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the 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 January 25, 2010 appellant, through counsel, filed a timely appeal from a December 28, 2009 merit decision of the Office of Workers' Compensation Programs affirming the termination of appellant's compensation for failure to accept 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 April 11, 2009 on the grounds that she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c).

FACTUAL HISTORY

On February 10, 2005 appellant, then a 48-year-old temporary cook, filed a traumatic injury claim alleging that on that day she injured her left shoulder and left knee when she slipped and fell on ice. The Office accepted the claim for left shoulder/arm strain and left knee contusion and placed her on the periodic rolls for temporary total disability.

An August 29, 2006 functional capacity evaluation determined that appellant was capable of performing sedentary work. Physical restrictions included no lifting or carrying more than 10 pounds; occasional left arm reaching and occasional left arm overhead reaching.

In a May 21, 2007 work capacity evaluation form, Dr. Steven B. Fish, a treating Board-certified orthopedic surgeon, found appellant was capable of working eight hours a day with restrictions including no lifting/pushing/pulling more than 10 pounds and no reaching or reaching above the shoulder for more than an hour.

In a May 16, 2008 report, Dr. Christopher V. Horn, a second opinion Board-certified orthopedic surgeon, diagnosed left knee osteoarthritis, left shoulder degenerative arthopathy and rotator cuff impingement syndrome. He advised that appellant was capable of working an eight-hour day with restrictions. The restrictions included intermittent lifting up to 25 pounds, occasional lifting of up to 40 pounds, more frequent lifting of 5 to 10 pounds and intermittent sitting and walking.

On September 8, 2008 the employing establishment offered appellant the position of office automation clerk, with restrictions of light duty, no pushing, pulling or lifting more than 25 pounds and a 15-minute break every 2 hours. The position description indicated that the duties and responsibilities including performing a variety of clerical, administrative and secretarial duties in support of organization; receiving visitors and telephone calls; routing, distributing and controlling mail and other office communications in accordance with the organization and personnel; using word processing equipment and the computer to process and produce a variety of tabular and narrative documents including travel orders, correspondence, reports, technical papers, charts, messages, statistical tables and other documents; maintaining official files; referring to text books, technical dictionaries, research papers or similar reference material and other jobs as assigned. The position required appellant to possess knowledge and expertise in secretarial skills including typing and working at a computer and in processing statistical data and in operating office equipment such as printers and modems. The work was characterized as sedentary with some walking, standing, carrying light items and bending.

Appellant declined the position on September 10, 2009 on the grounds that she had no knowledge of computers or typing skills. Her only work experience had been in cooking and fitness.

On January 24, 2009 the employing establishment noted that it had based the offered position on appellant's résumé which indicated typing skills of 40 words a minute and that training was available for areas appellant needed. Appellant stated that she was capable of typing 40 words a minute, provided an e-mail address and listed her employment history. She noted that she ran her own catering business from May 2004 to October 2006, that she worked as a fitness trainer from June 1995 to August 2004, worked as a chef from April 2000 to December 2001 and as a head chef/manager from May 1992 to November 1994. Under education, appellant received an associates degree in 1995.

On February 10, 2009 the Office informed appellant that it had reviewed the physical requirements of the offered position and had determined that it was suitable as it conformed with

her work capability. The employer confirmed that the position remained available to appellant. The Office instructed appellant that she must, within 30 days, either accept the position or provide a written explanation of the reason she did not accept the position, or she could lose her right to compensation under 5 U.S.C. § 8106(c) of the Act.

In an undated letter, appellant declined the offered position because she had no experience with computers or any typing skills. She reiterated that all her work experience had either been related to either fitness or cooking.

By letter dated March 9, 2009, the Office found that the reasons given by appellant for refusing the offered position were not valid. It gave her 15 additional days to accept the position or to make arrangements to report to this position. The Office noted that, if she did not accept the position within 15 days of the date of the letter, her right to compensation for wage loss or a schedule award would be terminated pursuant to section 8106 of the Act. It would not consider any further reasons for refusal.

By decision dated March 25, 2009, the Office terminated appellant's monetary compensation benefits effective that day, finding that appellant refused to accept a suitable job offer.

On October 12, 2009 appellant's counsel requested reconsideration. She contended that she rejected the offered position as she had no typing skills or computer knowledge. Appellant related that she only put the e-mail address, which her husband set up, and that she could type 40 words a minute on her résumé so as "to not look stupid."

By decision dated December 28, 2009, the Office denied modification of the March 25, 2009 decision.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[1] Under section 8106(c)(2) of the Act, the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[2] To justify termination, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[3] 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.[4]

[1] *A.W.*, 59 ECAB 593 (2008).

[2] 5 U.S.C. § 8106(c)(2); *see also Mary E. Woodard*, 57 ECAB 211 (2005); *Geraldine Foster*, 54 ECAB 435 (2003).

[3] *T.S.*, 59 ECAB 490 (2008); *Ronald M. Jones*, 52 ECAB 190 (2000).

[4] *Richard P. Cortes*, 56 ECAB 200 (2004); *Joan F. Burke*, 54 ECAB 406 (2003).

When the Office considers a job to be suitable, it shall advise the employee of its finding and afford her 30 days to either accept the job or present any reasons to counter the Office's finding of suitability.[5] If the employee presents such reasons and the Office determines that the reasons are unacceptable, it will notify the employee of that determination and further inform the employee that she has 15 days in which to accept the offered work without penalty.[6] After providing the 30-day and 15-day notices, the Office will terminate the employee's entitlement to further compensation.[7] However, the employee remains entitled to medical benefits.[8]

Section 8123(a) of the Act provides in pertinent part: "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."[9] Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.[10]

ANALYSIS

The Office accepted appellant's claim for left shoulder/arm strain and left knee contusion and placed her on the periodic rolls for temporary total disability. The issue to be resolved is whether the Office properly terminated appellant's compensation benefits on the grounds that she refused suitable work.

Dr. Fish, a treating Board-certified orthopedic surgeon, indicated appellant was capable of working eight hours per day with restrictions including no lifting/pushing/pulling more than 10 pounds and no reaching or reaching above the shoulder for more than an hour.

Dr. Horn, a second opinion Board-certified orthopedic surgeon, indicated that appellant was capable of working an eight-hour day with restrictions. The restrictions included intermittent lifting up to 25 pounds, occasional lifting of up to 40 pounds, more frequent lifting of 5 to 10 pounds and intermittent sitting and walking.

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits due to an unresolved conflict of medical opinion evidence between Dr. Fish and Dr. Horn. While both physicians concurred that appellant was capable of working

[5] 20 C.F.R. § 10.516.

[6] *Id.* However, the 15-day notification need not explain why the Office found the employee's reasons for refusal unacceptable. *Id.*

[7] 20 C.F.R. § 10.517(b). This includes compensation for lost wages as well as compensation for any permanent loss of use of a scheduled member. *Id.*; *see* 5 U.S.C. §§ 8105, 8106 and 8107.

[8] 20 C.F.R. § 10.517(b).

[9] 5 U.S.C. § 8123(a); *see also R.H.*, 59 ECAB 382 (2008); *Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

[10] *V.G.*, 59 ECAB 635 (2008); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

an eight-hour day, they disagreed on the extent of her work restrictions. Dr. Fish advised that appellant had a lifting restriction of no more than 10 pounds and no above the shoulder reaching for more than one hour. Dr. Horn found that appellant was capable of intermittent lifting up to 25 pounds and occasional lifting of up to 40 pounds. Due to the conflict in the medical opinion evidence on appellant's physical restrictions, the Office failed to meet its burden of proof to terminate appellant's compensation benefits and the December 28, 2009 decision will be reversed.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation on April 11, 2009 on the grounds that appellant refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 28, 2009 is reversed.

Issued: January 26, 2011
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