United States Department of Labor
Employees' Compensation Appeals Board

R.F., Appellant	)	
and	)	**Docket No. 10-1020**
	)	**Issued: January 13, 2011**
DEPARTMENT OF THE NAVY, NAVAL SUPPLY SYSTEMS COMMAND, Philadelphia, PA, Employer	)	

Appearances:
Thomas R. Uliase, 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 October 28, 2009 appellant filed a timely appeal from a July 28, 2009 merit decision of the Office of Workers' Compensation Programs which terminated her monetary compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether the Office properly terminated appellant's monetary compensation effective December 21, 2008 on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On September 15, 1999 appellant, then a 33-year-old accountant, claimed an injury to her knees, right elbow, neck and back when she slipped and fell on a wet floor. The Office accepted lumbar sprain and bilateral knee contusion. It authorized left knee arthroscopic surgery, which appellant underwent on February 9, 2000. Appellant stopped work on September 15, 1999. She returned to work for as a systems analyst for four hours a day with restrictions on

December 28, 2003. Appellant stopped work again on May 4, 2005 and did not return.[1] She received wage-loss compensation for four hours daily.

Appellant was treated by Dr. Randall Smith, a Board-certified orthopedic surgeon. On September 7, 2005 Dr. Smith noted that she stopped work in May 2005 due to increased spasms, pain, paresthesias and buckling in her legs. He opined that appellant's degenerative disc disease, protrusions, herniations, sciatica, internal derangement of the knees and a gait dysfunction were due to the September 15, 1999 work injury. On June 12, 2007 Dr. Smith stated that annular ligament tears sometimes occurred in a fall and symptoms from a protruding disc were not always immediately apparent. He advised that there was objective evidence to support appellant's subjective complaints. Dr. Smith opined that appellant remained totally disabled and could not work.

The Office subsequently referred appellant to a second opinion physician. In an August 2, 2007 report, Dr. Gene Levin, a Board-certified orthopedic surgeon, addressed the claimed recurrence of disability. He found that appellant's diagnoses of bilateral chondromalacia patella, chronic low back pain and left sciatica associated with progression of preexistent lumbar disc degeneration and treatment were not causally related to the September 15, 1999 work injury. The September 15, 1999 fall did not cause a herniated disc, but that the disc herniations developed much later as a result of progression of her preexisting lumbar disc degeneration. Dr. Levin advised that appellant's disability was not work related but was caused by degenerative arthritis (chondromalacia) and left sciatica resulting from degenerative spondylosis.

On August 20, 2007 the Office initially proposed to terminate appellant's compensation benefits on the basis of Dr. Levin's opinion; but it found a conflict in medical opinion between Dr. Levin and Dr. Smith on the cause and extent of any residuals due to the work-related injuries. It referred appellant to Dr. David R. Pashman, a Board-certified orthopedic surgeon, to serve as an impartial medical specialist to resolve the conflict in medical opinion.

In a January 4, 2008 report, Dr. Pashman discussed appellant's history, physical examination and his review of the medical records. He diagnosed bilateral knee contusions and lumbar strain, status post work-related injury in September 1999; preexisting degenerative disc disease of the lumbar spine; possible left lumbar radiculopathy; flap tear of the anterior horn of the left medial meniscus and medial femoral condylar defect and right medial meniscal tear. Dr. Pashman noted an electromyogram (EMG) study of September 2002 he wanted to review. He explained that the magnetic resonance imaging (MRI) scan studies of February 28, 2007 showed degenerative joint disease and a herniated disc, but found that these conditions were not related to the work injury. Dr. Pashman advised that appellant's work stoppage in 2005 was unrelated to her September 15, 1999 injury. He completed a Form OWCP-5 indicating that appellant was capable of working modified work-related activities with limited bending and lifting activities in the workplace with no lifting more than 25 pounds and no sitting more than 15 to 20 minutes at any given time in front of her computer and to move freely about in the

[1] Appellant also appealed a February 17, 2009 Office decision that denied her recurrence of disability claim. By decision dated June 10, 2010, the Board remanded the case to the Office for further development on whether she sustained a recurrence of disability as of May 4, 2005. (Docket No. 09-1605, issued June 10, 2010).

workplace. Dr. Pashman opined appellant was able to return to her sedentary duties as a systems analyst. In an accompanying work restriction evaluation, he reiterated that appellant could work eight hours daily with restrictions.

On April 2, 2008 the Office requested that Dr. Pashman state whether any of appellant's current diagnoses were caused by the effects of the September 15, 1999 work injury and to provide his medical rationale. In a supplemental report of April 7, 2008, Dr. Pashman reviewed several diagnostic reports, including the EMG of September 27, 2002. He concluded that appellant's L5 lumbar radiculopathy could be causally related to the September 1999 work injury but the disc pathologies were related to her underlying degenerative disc disease. The MRI scan of 2002 revealed a left knee ligament strain, but this condition was not related to the work injury as a ligamentous injury would have been noted at the time of the February 2000 debridement. Dr. Pashman stated that the right knee MRI scan of December 3, 1999 showed a right medial meniscus tear that was work related. On May 16, 2008 the Office asked Dr. Pashman to address whether appellant had residuals of her accepted lumbar sprain. In a May 27, 2008 report, Dr. Pashman stated the L5 radiculopathy was causally related to the work injury but found that appellant's bilateral knee contusions and lumbar strain had resolved. The Office subsequently accepted a torn right medical meniscus and L5 radiculopathy.

In a July 8, 2008 letter, the employing establishment offered appellant a position as a Information Technology (IT) specialist (systems analyst) based on Dr. Pashman's recommendation that she return to modified work for eight hours a day with limitations of no lifting more than 25 pounds, no prolonged sitting more than 15 to 20 minutes at a given time and flexibility to move about the workplace. Appellant would not be required to lift over 25 pounds and she could sit or stand at her convenience. The work was mostly sedentary, although some walking, bending and moderate lifting may be required. A copy of the position description and physical requirements were submitted. In a July 29, 2008 letter, the employing establishment advised that appellant would not accept or reject the position until she had the opportunity to consult with her treating physician.

In an August 8, 2008 letter, the Office advised appellant that the position of IT specialist (system analyst) was medically and vocationally suitable and remained open and available to her. It informed her of the penalty provisions of 5 U.S.C. § 8106(c)(2) with respect to refusal of suitable work and afforded her 30 days to either accept the position or provide an explanation of reasons for rejecting the position.

In an August 13, 2008 report, Dr. Smith stated that he did not think appellant could perform the offered position. Appellant had previously performed such duties and he anticipated the same results. Dr. Smith reiterated that appellant was totally disabled and needed an aquatic exercise program, home equipment and medications and restricted activities.

In an October 8, 2008 letter, the Office informed appellant that her reasons for refusing the position had been considered and were found to be not valid. It noted that the employing establishment noted that the position remained available. Appellant was afforded an additional 15 days to accept the position.

In a telephone call received October 23, 2008 and in an October 28, 2008 letter, appellant stated that she had made arrangements with her supervisor, Bill Brower, to report back to work on November 17, 2008. In a November 13, 2008 telephone message, however, the employing establishment notified the Office that appellant had applied for and was approved for disability retirement. It also confirmed that the offered position remained open and available to appellant.

On November 18, 2008 the Office contacted the employing establishment, which verified that appellant had reported to work on November 17, 2008 but it was unclear whether she performed the offered position. In two notes dated November 17, 2008, appellant's supervisor, Mr. Brower, confirmed that the job offered to appellant was still open and available had she not elected Office of Personnel Management disability request. He confirmed that appellant reported to work on November 17, 2008. A copy of appellant's SF-50 notification of personnel action form noted that her disability retirement was effective as of November 8, 2008.

By decision dated December 2, 2008, the Office terminated appellant's entitlement to monetary compensation benefits effective December 21, 2008 on the basis that she had refused an offer of suitable employment.

On December 5, 2008 appellant's attorney requested a hearing that was held on May 18, 2009. In a December 9, 2008 note, Mr. Brower advised that he had made arrangements with appellant to return to work on November 17, 2008 as of October 20, 2008, which was within the 15 days she was given to accept the job offer.

In a November 7, 2008 e-mail to appellant, Eleanor St. John, human resource specialist (employee benefits), noted that taking disability retirement would not jeopardize her "OWCP." A November 14, 2008 e-mail to appellant from Betty Newsome, supervisory human resource specialist, noted that she could not cancel appellant's retirement.

Following the May 19, 2009 hearing, Maria Darragh, human resources specialist, indicated in a June 25, 2009 letter that appellant had the option to decline disability retirement, return to work on November 17, 2008 as agreed and, if need be at a later point, submit another application to OPM for disability retirement.

In a July 28, 2009 decision, an Office hearing representative affirmed the December 2, 2008 termination decision. On October 28, 2008 appellant made arrangements to report to work on November 17, 2008 but her disability retirement was approved and accepted on or about November 8, 2008, removing herself from the agency rolls. The hearing representative found that appellant's acceptance of a disability retirement was not consistent with her prior agreement to accept the job offer. By taking such action appellant refused the job offer. The hearing representative noted that appellant did not subsequently decline the disability retirement or return to work.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[2] Section 8106(c)(2) of the Federal Employees'

[2] *Barry Neutach*, 54 ECAB 313 (2003); *Lawrence D. Price*, 47 ECAB 120 (1995).

Compensation Act[3] provide that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to compensation.[4] The Office may not terminate compensation without establishing that the disability ceased or that it is no longer related to the employment.[5] The Board has stated that monetary compensation payable to an employee under section 8107 are payments made from the Employees' Compensation Fund and are, therefore, subject to penalty provision of section 8106(c).[6]

Section 10.517(a) of the Act's implementing regulations provide that an employee who refused to work after suitable work has been offered to or secured for the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.[7] Pursuant to section 10.516, the employee shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.[8]

In situations where there exist 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

A medical conflict arose between Dr. Smith, appellant's treating physician, who opined that appellant continued to have residuals of her work-related conditions and could not work, and Dr. Levin, for the Office, who opined that appellant's current complaints were a result of preexisting conditions.[10] The Office referred appellant to Dr. Pashman, an impartial medical examiner, to resolve the conflict.

In reports dated January 4, April 7 and May 27, 2008, Dr. Pashman advised appellant's continuing symptomatology in her lumbar spine was related to both her degenerative disc disease and L5 radiculopathy; that her knee contusions have resolved and she has ongoing symptom complex in her knees from her meniscal tear. He found appellant capable of working modified

[3] 5 U.S.C. §§ 8101-8193.

[4] *Id.* at § 8106(c)(2); *see also Linda D. Guerrero*, 54 ECAB 556 (2003).

[5] *Ronald M. Jones*, 52 ECAB 190 (2000); *Arthur R. Reck*, 47 ECAB 339 (1995).

[6] *Sandra A. Sutphen*, 49 ECAB 174 (1997); *Stephen R. Lubin*, 43 ECAB 564 (1992).

[7] 20 C.F.R. § 10.517(a); *see Ronald M. Jones, supra* note 5.

[8] *Supra* note 19 at § 10.516; *see Kathy E. Murray*, 55 ECAB 288 (2004).

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

[10] Appellant was referred to Dr. Levin to resolve the conflict in medical opinion on the issue of whether appellant sustained a recurrence of total disability on or after May 4, 2005. Thus, on the issue of whether appellant continued to have disabling residuals of her work-related conditions and could not work, Dr. Levin was not a referee physician but was in the nature of a second opinion physician.

full-time work with limited bending and lifting activities in the workplace with no lifting more than 25 pounds and no sitting more than 15 to 20 minutes at any given time in front of her computer and to move freely about in the workplace. Dr. Pashman opined she was able to return to her sedentary work-related duties as a systems analyst. As this impartial opinion is based on proper factual and medical background, the Board finds that it is entitled to special weight.[11]

The employing establishment offered appellant the position of IT specialist (system analysis) within the restrictions set forth by Dr. Pashman. The Office properly relied upon the opinion of Dr. Pashman, the impartial medical specialist, in determining that the offered position of IT specialist (system analysis) was within appellant's restrictions and, thus, suitable.

The Board further notes that the Office complied with its procedural requirements in advising appellant that the position was found suitable, providing her with the opportunity to accept the position or provide her reasons for refusing the job offer and notifying her of the penalty provision of section 8106(c).[12]

The Office found that appellant refused an offer of suitable work and terminated her entitlement to monetary compensation effective December 21, 2008. It noted that her disability retirement became effective November 8, 2008, which was before the date that she sought to return to work. Under Office procedures, retirement is not considered an acceptable reason for refusing an offer of suitable work.[13]

In the case of *David Budzik*,[14] the Board affirmed the Office's termination of compensation under section 8106(c). There was some ambiguity as to whether the employee intended to return to work and he asserted that he had been granted leave under the Family Medical Leave Act (FMLA). The Board noted that the employee did not show he was covered by the FMLA as of the time of the Office's termination and that the evidence did not support his condition. As of the date of the termination decision in this case, appellant had retired on disability as of November 8, 2008. While the record reflects that she appeared at work on November 17, 2008, there is no evidence that her disability retirement had been rescinded or otherwise declined. Statements from Mr. Brower, appellant's supervisor, note discussions pertaining to appellant's return to work on November 17, 2008. While this is some evidence of her intent to return to work during late October, appellant subsequently retired as of November 8, 2008. Although Mr. Brower confirmed that appellant was physically present at the worksite on November 17, 2008, there is no evidence of record that she had changed her mind or any documentation to establish that her disability retirement was set aside. When appellant accepted disability retirement on November 8, 2008, she effectively removed herself from the employing establishment rolls. While counsel contends that the employing establishment

[11] *Darlene R. Kennedy*, 57 ECAB 414 (2006).

[12] *See Bruce Sanborn*, 49 ECAB 176 (1997).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(c) (July 1997). *See also Robert P. Mitchell*, 52 ECAB 116 (2000) (where the claimant chose to receive disability retirement benefits rather than accept a position offered by the employing establishment).

[14] 52 ECAB 339 (2001).

withdrew the job offer, this is not supported by the record. The employer confirmed the job was open and available. There is no evidence to support appellant's assertion that the employing establishment "tricked" her into returning to work.

The Office met its burden of proof in this case to terminate appellant's monetary compensation benefits pursuant to 5 U.S.C. § 8106(c).

CONCLUSION

The Board finds that the Office met its burden to terminate appellant's compensation effective December 21, 2008 on the grounds that she refused an offer of suitable work.

ORDER

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

Issued: January 13, 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