United States Department of Labor
Employees' Compensation Appeals Board

C.J., Appellant	)	
and	)	**Docket No. 10-1520**
	)	**Issued: March 22, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Carrollton, TX, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 17, 2010 appellant filed an appeal from a March 29, 2010 decision of an Office of Workers' Compensation Programs' hearing representative who affirmed the termination of her monetary compensation on the grounds that she refused 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 this case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation benefits effective November 23, 2008 pursuant to 5 U.S.C. § 8106.

On appeal appellant's attorney asserts that the decision is contrary to fact and law.

FACTUAL HISTORY

On January 8, 2009 appellant, then a 42-year-old city carrier, sustained a laceration of the right hand caused by a dog bite incurred while delivering mail. In a January 8, 2009 emergency room report, Dr. Michael Glassinger, Board-certified in emergency medicine, diagnosed a puncture wound to the right wrist. A right wrist x-ray showed no fractures or dislocations, mild

degenerative joint disease in the distal radial ulnar joint, and intrinsically normal carpal bones and proximal metacarpals. On January 9, 2009 Dr. Glassinger described physical findings of a superficial laceration to the right wrist from a dog bite. He advised that appellant could return to work but should limit use of the right wrist for three days and follow-up with her primary care physician. Appellant did not return to work.

Duty status reports dated January 12 and 30, 2009 indicated that appellant could not work.[1] In a February 17, 2009 report, Dr. Kelly Alana, a chiropractor, noted appellant's complaint of right upper extremity pain and discomfort. She provided findings on physical examination and diagnosed sprain/strain to the wrist, forearm and elbow and laceration to the right hand. A February 20, 2009 magnetic resonance imaging (MRI) scan of the right wrist and right forearm demonstrated no abnormality. A March 9, 2009 MRI scan of the right elbow was unremarkable. On March 2, 2009 Dr. Alana advised that appellant could work in a sedentary category.

In a March 5, 2009 report, Dr. Diane S. Litke, a Board-certified orthopedic surgeon, noted the history of injury and provided right upper extremity examination findings, noting a small dog bite scar on the right wrist. Neurologic examination was normal. Tinel's and Phalen's signs were negative for numbness but both elicited pain and Finkelstein's test was positive for pain in the mid-portion of the wrist. There was tenderness over the lateral epicondyle, forearm extensor muscles and over the dorsum of the wrist and no appreciable swelling but some atrophy of forearm muscles. Dr. Litke reported that appellant had no strength against resistance in finger abduction, finger pinch, grip, wrist flexion or extension. She diagnosed dog bite to the forearm consistent with contusion and possible tenosynovitis. Dr. Litke found that appellant's extreme lack of strength indicated either severe neurologic damage to all three major nerves in the hand, which did not occur, or lack of effort as her symptoms were out of proportion to her injury. She recommended a nerve conduction study (NCS). Randy Gibson, a licensed professional counselor, performed a behavioral health evaluation on March 10, 2009 and diagnosed post-traumatic stress disorder and depression with anxiety due to chronic pain and physical limitations.

An April 3, 2009 bilateral upper extremity electromyography (EMG) and NCS studies were interpreted as normal by Dr. Sameer A. Fino, a Board-certified physiatrist. No carpal tunnel syndrome, ulnar or radial nerve injury was identified. In reports dated April 3 to May 18, 2009, Dr. Fino advised that appellant could not work, noting that she "seems to have RSD." On June 15, 2009 he stated that appellant's report that her pain was getting worse, moving up the arm into the shoulder. Dr. Fino found decreased wrist range of motion on physical examination and diagnosed wrist pain and right arm RSD. He advised that she could return to work for four hours a day on June 22, 2009.

On June 23, 2009 appellant accepted a modified assignment as lobby director for four hours a day. The duties included meeting and greeting customers, writing second notices on all accountable mail and assisting customers at the automated stamp machine. Appellant returned to

[1] The signatures are illegible.

work for 1.53 hours on June 24, 2009 but stopped, noting she was in excruciating pain and could not work.

By letter dated June 25, 2009, the Office 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(c)(2) of the Federal Employees' Compensation Act,[2] her right to compensation for wage loss or a schedule award would be terminated. She was given 30 days to respond. In an undated response, appellant contended that the job was not difficult but that, due to excruciating pain, she could not work. In reports dated June 29, 2009, Dr. Fino noted that she had attempted a return to work. He noted hypersensitivity on examination of the right arm, diagnosed right wrist pain and RSD of the right arm and advised that appellant could not work. Dr. Fino advised that she could not work due to hypersensitivity of the right arm, but that she should be able to return to full duties within six months. In an August 24, 2009 report, an Office medical adviser reviewed the medical record and advised that RSD should not be accepted and more clinical evidence obtained before the diagnosis was accepted.

By letter dated September 3, 2009, the Office informed appellant that her reasons for refusing the offered position were not valid and she was given an additional 15 days to accept the offered position. In a September 11, 2009 response, appellant asserted that she had RSD and enclosed the July 2, 2009 report of Dr. Stephen Becker, a Board-certified physiatrist, who reported a history of injury that appellant tried to vigorously extract her hand from the dog, causing traction to the right upper extremity.[3] On physical examination, Dr. Becker noted findings of decreased cervical rotation on the right with tenderness over the brachial plexus and significant atrophy of the right upper and lower arm and hand intrinsics. Strength was somewhat pain limited in the right upper extremity and she had altered sensation and decreased subjective sense in the lateral aspect of the right arm. Dr. Becker diagnosed right hand dog bite and right brachial plexus stretch injury due to right arm traction versus cervical radiculopathy. He recommended a cervical MRI scan and repeat EMG study. A July 28, 2009 MRI scan study of the cervical spine was unremarkable. On August 28, 2009 Dr. Fino reiterated his diagnosis of right arm RSD and advised that appellant could not work.

On September 21, 2009 the employing establishment confirmed that the offered position remained available. In a decision dated September 21, 2009, the Office terminated appellant's compensation benefits effective October 25, 2009. It found that she neglected an offer of suitable work.

In reports dated September 25 and October 1, 2009, Dr. Fino reiterated his findings and conclusions. On October 2, 2009 Dr. Theodore R. Simon, Board-certified in nuclear medicine, reported that the results of a bone scintigram study were not indicative of RSD but were suggestive of arthritis. On October 8, 2009 Dr. Fino advised that appellant could return to work for four hours daily. Appellant returned to work in mid-October 2009. On October 18, 2009 appellant, through her attorney, requested a hearing. In a December 10, 2010 report,

[2] 5 U.S.C. §§ 8101-8193.

[3] Dr. Becker's report was apparently prepared for a third-party claim.

Dr. Charles E. Willis, II, a Board-certified anesthesiologist, noted the history of injury and appellant's complaint of right upper extremity pain that limited her ability to work, exercise and have fun. He provided findings on physical examination and diagnosed status post dog bite, post-traumatic stress and possible brachial plexus injury and provided restrictions to her physical activity. At the January 12, 2010 hearing her attorney argued that the offered position was not suitable because appellant worked full time before the injury and the offered position was part time. Appellant asserted that the employment injury caused a brachial plexus condition, as confirmed by Dr. Becker. In reports dated January 21 and February 18, 2010, Dr. Willis advised that appellant should continue modified duty.

In a decision dated March 29, 2010, an Office hearing representative affirmed the September 21, 2009 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."[4] 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.[5] The implementing regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured 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.[6] 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.[7] 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.[8] 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.[9]

Office procedures provide that a job which involves less than four hours of work per day where the claimant is capable of working four or more hours per day will be considered unsuitable.[10] The issue of whether an employee has the physical ability to perform a modified

[4] 5 U.S.C. § 8106(c).

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

[6] 20 C.F.R. § 10.517(a).

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

[8] 20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB 681 (2004).

[9] 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).

[10] *Id*. at Chapter 2.814.4.b(1) (July 1997).

position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence.[11] It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.[12]

ANALYSIS

The Office accepted that appellant sustained a laceration of the right hand caused by a dog bite on January 8, 2009. In a September 21, 2009 decision, it terminated her monetary compensation effective October 25, 2009 on the grounds that she abandoned a June 23, 2009 offer of suitable employment. The initial question is whether the Office properly determined that the position was suitable, a medical question that must be resolved by the medical evidence.[13] The medical evidence in this case establishes that the June 23, 2009 position offered by the employing establishment was suitable.

February 2009 MRI scan studies of the right wrist, elbow and forearm were negative and an April 3, 2009 EMG/NCS was normal. On June 15, 2009 Dr. Fino, an attending physiatrist, advised that appellant could return to work for four hours a day on June 22, 2009.

On June 23, 2009 the employing establishment offered appellant a sedentary position as lobby director for four hours a day, which she accepted. The duties were described as meeting and greeting customers, writing second notices on all accountable mail and assisting customers at the automated stamp machine. The only restriction provided by Dr. Fino was a shortened workday of four hours. The Office, therefore, properly found that the offered position was suitable as the weight of the medical evidence at that time established that appellant was no longer totally disabled from work and had the physical capacity to perform the modified duties listed in the June 23, 2009 job offer.

Appellant worked 1.53 hours and stopped, stating that, although the job was not difficult, she was in excruciating pain and could do nothing. She did not seek medical care for five days after the work stoppage, and in reports dated from June 29 to October 1, 2009, Dr. Fino noted hypersensitivity of the right arm, diagnosed RSD and advised that appellant could not work. These reports are of limited probative value because Dr. Fino did not provide adequate medical rationale in support of his stated opinion. Dr. Fino did not describe appellant's condition in any detail or explain how her condition changed from such that it rendered her unable to perform the essentially sedentary duties of lobby director for four hours a day. The Board finds these reports insufficient to establish that the offered position was not medically suitable.[14] While Dr. Becker provided a new diagnosis of right brachial plexus stretch injury versus cervical radiculopathy in his July 2, 2009 report, he did not address the suitability of the offered position or provide any opinion as to whether appellant could work.

[11] *Gayle Harris*, 52 ECAB 319 (2001).

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

[13] *Gayle Harris, supra* note 11.

[14] *S.S.*, 59 ECAB 315 (2008).

In order to properly terminate appellant's compensation under section 8106 of the Act, the Office must provide appellant notice of its finding that an offered position is suitable and give her an opportunity to accept or provide reasons for declining the position.[15] The record in this case establishes that the Office properly followed the procedural requirements. By letter dated June 25, 2009, the Office advised appellant that the offered position was found suitable. Appellant was notified that, if she failed to report to work or to demonstrate that such failure was justified, her right to monetary compensation would be terminated. She was allotted 30 days to either accept or provide reasons for refusing the position. On September 3, 2009 appellant was given an additional 15 days in which to respond. There is no evidence of a procedural defect in this case. The Office provided appellant with proper notice. Appellant was offered a suitable position by the employing establishment and the offer was refused. Under section 8106 of the Act, her monetary compensation was properly terminated effective October 25, 2009 on the grounds that she refused an offer of suitable work.[16]

After the Office established that the offered work was suitable, the burden shifted to appellant to show that her refusal was reasonable or justified.[17] The bone scintigram obtained on October 2, 2009 ruled out the diagnosis of RSD. On October 8, 2009 Dr. Fino advised that appellant could return to light duty for four hours daily. In reports dated November 16, 2009, he noted that appellant had continued complaints of right arm pain and could work four hours a day. Dr. Willis also advised that appellant could work four hours daily. Neither physician provided any opinion on the suitability of the offered position or whether appellant could have worked beginning in June 2009. Appellant therefore failed to establish that her neglect of a suitable position was justified.

CONCLUSION

The Board finds that the Office properly terminated appellant's wage-loss compensation pursuant to 5 U.S.C. § 8106(a) and that she did not, thereafter, establish that her refusal of suitable work was justified.

[15] *See Maggie L. Moore*, *supra* note 7.

[16] *Joyce M. Doll*, *supra* note 5.

[17] *M.S.*, 58 ECAB 328 (2007).

ORDER

IT IS HEREBY ORDERED THAT the March 29, 2010 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: March 22, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board