United States Department of Labor
Employees' Compensation Appeals Board

C.W., Appellant	)	
and	)	**Docket No. 10-2074**
	)	**Issued: May 23, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Baton Rouge, LA, 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
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 10, 2010 appellant, through her attorney, filed a timely appeal from a July 7, 2010 merit decision of the Office of Workers' Compensation Programs terminating her compensation for refusing suitable work. Pursuant to the Federal Employees' Compensation Act[1] and 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 December 29, 2009 on the grounds that she refused an offer of suitable work under 5 U.S.C. § 8106(c).

FACTUAL HISTORY

On December 31, 2003 appellant, then a 43-year-old letter carrier, filed a claim alleging that she sustained injuries to her right leg, bilateral knees, neck and back on that date in a motor

[1] 5 U.S.C. § 8101 *et seq.*

vehicle accident. She stopped work on December 20, 2003. The Office accepted the claim for a contusion of the right lower leg, thigh and knee and sprains of the cervical and lumbar spine.[2]

The Office paid appellant compensation for intermittent periods of disability.[3] In 2008, it began paying her compensation for total disability on the periodic rolls.

On March 10, 2009 the Office referred appellant to Dr. Christopher Cenac, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated April 9, 2009, Dr. Cenac diagnosed degenerative pathology most pronounced at L4-5 and L5-S1. He opined that appellant was unable to return to her usual employment due to physical limitations from her 2003 injury but could perform sedentary and light work.

In a progress report dated May 4, 2009, Dr. Thad S. Broussard, an attending Board-certified orthopedic surgeon, concurred with Dr. Cenac's finding that appellant could perform sedentary employment. In a form report dated June 22, 2009, he diagnosed spondylosis and degenerative joint disease and opined that appellant was totally disabled from employment.

The Office determined that a conflict existed regarding the extent of appellant's disability. It referred her to Dr. Gordon P. Nutik, a Board-certified orthopedic surgeon, for resolution of the conflict. On August 25, 2009 Dr. Nutik reviewed the history of injury and the results of diagnostic studies, discussed appellant's current complaints and listed detailed findings on physical examination. He noted that she took Vicodin, Mobic and Soma twice a day. Dr. Nutik diagnosed resolved soft tissue sprains of the neck, low back, right knee and ankle and "degenerative disc changes at the L4-5 level which may have been aggravated as a result of the injury on [December 19, 2003] when [appellant] sustained the low back strain." He related:

> "I feel that the residuals from the low back continue to persist and limits [appellant's] ability to lift, bend and remain in one position, either sitting, standing or walking, for prolonged periods of time. [Appellant] is not completely confined to bed rest. I feel that she is capable of working in a sedentary level of activity."

Dr. Nutik advised that appellant's condition had deteriorated due to progressive L4-5 disc disease. In a work restriction evaluation, he found that she could work eight hours a day with restrictions on sitting up to six hours, walking, standing and reaching up to two hours, reaching above the shoulder and twisting up to one hour and no bending or stooping. Dr. Nutik further found that appellant could push, pull and lift 10 pounds for two hours. He determined that she could not operate a motor vehicle at work or go to and from work while on medication.

On October 23, 2009 the employing establishment offered appellant a position as a modified city carrier. The position required sitting four to five hours a day, walking, standing

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[2] By decision dated July 19, 2004, the Office rescinded acceptance of appellant's claim after finding that she was not in the performance of duty at the time of the December 19, 2003 motor vehicle accident. On July 14, 2005 a hearing representative reversed the July 19, 2004 decision.

[3] By decision dated January 11, 2008, the Office denied appellant's claim for compensation from November 6 to December 31, 2004. On April 10, 2007 a hearing representative reversed the January 11, 2008 decision.

and reaching two hours a day, twisting and reaching over the shoulder one hour a day and lifting up to 10 pounds a day.

By letter dated November 5, 2009, appellant related that she had applied for disability retirement and noted that she received the job offer after her application. She requested a continuation of her workers' compensation benefits until she began receiving disability retirement.

In a form report dated October 21, 2009, Dr. Broussard diagnosed cervical and lumbar spondylosis and an ankle sprain and found that appellant was totally disabled beginning December 2007. In an accompanying progress note, he asserted that she could not lift containers of mail or walk, bend or stand "for any period of time." Dr. Broussard opined that appellant was permanently disabled.

On November 10, 2009 the Office advised appellant of its determination that the offered position of city carrier was suitable and remained available. It further informed her that her compensation would be terminated under section 8106(c) if she refused an offer of suitable work. The Office provided appellant 30 days to accept the position or provided reasons for her refusal.

In a report dated November 3, 2009, received on December 1, 2009, Dr. Nutik asserted that appellant could not operate a motor vehicle at work or drive to and from work because she was "taking narcotic medications."

On December 1, 2009 the Office advised appellant that her reasons for refusing the offered position were not acceptable and informed her that she had 15 days to accept the position or have her compensation terminated.

By decision dated December 29, 2009, the Office terminated appellant's compensation and entitlement to a schedule award after finding that she refused suitable work under section 8106(c).

On January 7, 2009 appellant requested a telephone hearing. She did not appear at the hearing and her attorney requested a review of the written record.[4]

By decision dated July 7, 2010, the hearing representative affirmed the December 29, 2009 decision.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[5] In this case, it terminated appellant's compensation under section 8106(c)(2) of the Act,[6] which provides that a partially disabled employee who

[4] Appellant submitted additional medical evidence and the result of diagnostic studies.

[5] *Linda D. Guerrero*, 54 ECAB 556 (2003).

[6] 5 U.S.C. §§ 8101-8193.

refuses or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to compensation.[7] To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[8] 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.[9]

Section 10.517(a) of the Act's implementing regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured by the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.[10] 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.[11]

Once the Office establishes that the work offered is suitable, the burden shifts to the employee who refuses to work to show that the refusal or failure to work was reasonable or justified.[12] The determination of whether an employee is physically capable of performing a modified assignment is a medical question that must be resolved by medical evidence.[13] 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.[14]

ANALYSIS

The Office accepted that appellant sustained contusions of the right lower leg, thigh and knee and sprains of the cervical and lumbar spine in a December 31, 2003 motor vehicle accident. On April 9, 2009 Dr. Cenac, an Office referral physician, diagnosed degenerative changes at L4-5 and L5-S1. He found that appellant had continued limitations due to her work injury but could perform sedentary or light employment. On June 22, 2009 Dr. Broussard her attending physician, determined that she was totally disabled. The Office properly found a

[7] *Id*. at § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

[8] *Ronald M. Jones*, 52 ECAB 190 (2000).

[9] *Joan F. Burke*, 54 ECAB 406 (2003).

[10] 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 8.

[11] *Id*. at § 10.516.

[12] *Id*. at § 10.517(a).

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

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a) (July 1997).

conflict in medical opinion between Dr. Cenac and Dr. Broussard regarding whether appellant could return to a light-duty position and referred her to Dr. Nutik for resolution of the conflict.[15]

In a report dated August 25, 2009, Dr. Nutik reviewed appellant's medical history and described his findings on physical examination. He diagnosed degenerative changes at L4-5 possibly aggravated by the work injury. Dr. Nutik determined that appellant had restrictions as a result of her low back injury but could perform sedentary employment. He provided limitations of sitting six hours a day, walking, standing and reaching two hours a day, reaching over the shoulder and twisting one hour a day, pushing, pulling and lifting 10 pounds for two hours a day and no bending or stooping. Dr. Nutik advised that appellant was unable to operate a motor vehicle either at work or going to and from work when taking medication.

The Board finds that Dr. Nutik provided a complete and rationalized opinion, based on an accurate factual and medical background. Consequently, Dr. Nutik's opinion that appellant could return to work with limitations is accorded special weight due to his status as impartial medical examiner.[16]

On October 23, 2009 the employing establishment offered appellant the position of modified city carrier. The position offered required sitting four to five hours a day, walking, standing and reaching two hours a day, twisting and reaching over the shoulder one hour a day and lifting up to 10 pounds a day. The job offer did not, however, specify the amount of time that appellant had to lift everyday. Consequently, it is unclear whether the position is within her limitations of lifting up to two hours a day. Additionally, the Office failed to consider whether appellant could commute to the work location. Subsequent to its determination that the position was suitable, it received a November 3, 2009 report from Dr. Nutik clarifying that she could not operate a motor vehicle at work or drive to and from work because she was taking narcotic medication. The Board has held that an acceptable reason for refusing suitable work, if supported by the medical evidence, is an inability to travel to work.[17] The Office's procedures also provide that the inability to travel to work is an acceptable reason if the inability is because of residuals of the employment injury.[18] Dr. Nutik, the impartial medical examiner, found that appellant was unable to drive to and from work. The Office, however, did not address whether residuals of the work injury prevented her from commuting to and from work. As a penalty provision, section 8106(c)(2) must be narrowly construed.[19] The Board therefore finds that the Office did not discharge its burden of proof to terminate compensation under section 8106(c) of the Act.

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[15] Section 8123(a) 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 appointment. 5 U.S.C. § 8123(a); *see also Darlene R. Kennedy*, 57 ECAB 414 (2006).

[16] *See U.A.*, 59 ECAB 701 (2008); *Darlene R. Kennedy*, *id*.

[17] *See Mary E. Woodard*, 57 ECAB 211 (2005).

[18] Federal (FECA) Procedure Manual, *supra* note 14 at Chapter 2.814.5(a)(5) (July 1997).

[19] *Karen M. Nolan*, 57 ECAB 589 (2006); *see Stephen A. Pasquale*, 57 ECAB 396 (2006).

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation effective December 29, 2009 on the grounds that she refused an offer of suitable work under 5 U.S.C. § 8106(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 7, 2010 is reversed.

Issued: May 23, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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