United States Department of Labor
Employees' Compensation Appeals Board

P.G., Appellant	)	
and	)	**Docket No. 11-76**
	)	**Issued: January 17, 2012**
DEPARTMENT OF VETERANS AFFAIRS, LYONS VETERANS HOSPITAL, Lyons, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 13, 2010 appellant, through her attorney, filed a timely appeal of a June 17, 2010 Office of Workers' Compensation Programs' (OWCP) merit decision. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's compensation benefits effective December 10, 2009 on the grounds that she refused suitable work under 5 U.S.C. § 8106(c).

On appeal counsel argued that an associate of Dr. Mark Feierstein, a Board-certified orthopedic surgeon, Dr. Steven H. Fried, a Board-certified orthopedic surgeon, was improperly

[1] 5 U.S.C. § 8101 *et seq.*

selected to perform the impartial medical examination. In the alternative, Dr. Fried's reports were not sufficient to constitute the weight of the medical evidence.

FACTUAL HISTORY

On April 13, 1986 appellant, then a 37-year-old nursing assistant, filed a traumatic injury claim alleging that she injured her left arm in the performance of duty as a result of interaction with a combative patient. OWCP accepted her claim for contusion of the left forearm on May 5, 1986. It also accepted a fracture and traumatic arthritis of the left wrist. Appellant underwent excision of the left distal ulna on August 19, 1987 which OWCP approved. She did not return to work after surgery. Appellant was placed on the periodic rolls on February 25, 1988.

On May 15, 2006 Dr. Barbara Armas-Loughran, appellant's attending physician, completed a duty status report. She opined that appellant could not work and that her total disability was permanent. OWCP referred appellant for a second opinion examination on February 13, 2007 to Dr. David Rubinfeld, a Board-certified orthopedic surgeon. In a March 14, 2007 report, Dr. Rubinfeld diagnosed ankylosis of the right elbow at 90 degrees. He found that appellant had normal range of motion, no atrophy and no sensory deficit in the left wrist and hand. Dr. Rubinfeld stated that she did not have continuing contusions of her left forearm or elbow and that her examination was unremarkable. He concluded that appellant had no disability or residuals related to her 1986 employment injury.

The employing establishment offered appellant a position performing her regular duties as a nursing assistant on May 18, 2007. In a letter dated May 22, 2007, OWCP informed her that the offered position was found suitable and allowed her 30 days to accept the position or offer her reasons for refusal. It informed appellant of the penalty provision of section 8106(c)(2)[2] of FECA. Appellant submitted a duty status report from Dr. Armas-Loughran dated May 14, 2007, who again stated that appellant was permanently and totally disabled. She declined the offered position on May 22, 2007.

OWCP determined that there was a conflict of medical opinion between Drs. Armas-Loughran and Rubinfeld regarding the extent of appellant's work-related residuals and disability. It utilized the Physicians Directory Service (PDS) to locate an appropriate Board-certified physician to perform an impartial medical examination and resolve the conflict. The first three physicians selected by PDS did not accept referrals from OWCP. A Dr. Steven Reich was bypassed as his telephone number was not in service and directory assistance did not have another number. A Dr. Bernard Rineberg was bypassed as the physician was related to appellant. Dr. Feierstein was selected on December 12, 2007 at 10:31 a.m. and bypassed for the reason "Dr. Steven Fried is the doctor that handles IME's [impartial medical examinations]." Dr. Fried was selected by the PDS at 10:38 a.m. and OWCP scheduled an appointment. OWCP provided Dr. Fried with a list of questions and statement of accepted facts with addendum.

In a report dated March 27, 2008, Dr. Fried reviewed the medical records and noted appellant's history of injury. He noted that her right elbow symptoms did not start until three or

[2] *Id*. at § 8106(c)(2).

four years after the slip and fall. Dr. Fried stated that appellant had left wrist surgery in August 1987. On physical examination he found no swelling of the left wrist and no complaint of tenderness to palpation. Dr. Fried found five degrees each of flexion and extension with full supination and lacking 30 degrees of pronation. He examined an x-ray and found resection of the distal ulna and partial auto fusion of the distal radius with the proximal carpal row. Dr. Fried noted that x-rays demonstrated post-traumatic auto fusion of the distal radius with the proximal carpal row, but concluded that this condition was not due to the work injury of April 1986. He concluded that appellant's residual stiffness in the left wrist was due to auto fusion of the distal radial carpal joint. Dr. Fried further noted that her symptoms in the left wrist were minimal and consisted of stiffness with diminished flexion and extension. He did not recommend further medical treatment.

Dr. Armas-Loughran completed a work capacity evaluation on July 2, 2008 and reiterated that appellant was not capable of performing her date-of-injury position. She stated that appellant had limitations on reaching above the shoulder, twisting, bending/stooping, operating a motor vehicle, pushing, pulling, lifting and squatting.

On July 8, 2008 Dr. Fried completed a work capacity evaluation and that appellant was capable of performing her usual job with no limitations and that appellant had reached maximum medical improvement.

The employing establishment offered appellant the position of nursing assistant on July 29, 2008. In a letter dated August 8, 2008, OWCP proposed to terminate her medical and compensation benefits based on Dr. Fried's finding that appellant had no disability or medical residuals due to her accepted employment injuries of contusion of the left forearm, traumatic arthritis of the left wrist and left wrist fracture. Appellant declined the offered position on August 6, 2008.

By decision dated September 10, 2008, OWCP terminated appellant's compensation and medical benefits effective September 28, 2008 finding that she had no medical residuals or restrictions based on Dr. Fried's examination and report.

Counsel requested an oral hearing that was held on February 25, 2009. Appellant's first work injury occurred in 1982 when a door fell on her right arm. She stated on April 13, 1986 that she slipped and fell and that a patient fell on top of her and she fractured her wrist. Appellant presently experienced occasional left wrist pain and wore a brace.

By decision dated May 19, 2009, an OWCP hearing representative set aside the September 10, 2008 decision, finding that the statement of accepted facts provided to Dr. Fried was inadequate as it did not include left wrist fracture as an accepted condition. The hearing representative remanded the case for an amended statement of accepted facts and an additional report from Dr. Fried.

OWCP completed a statement of accepted facts on June 22, 2009 noting the additional conditions of left wrist fracture and left wrist traumatic arthritis. In a letter dated June 23, 2009, it requested a supplemental report from Dr. Fried asking that he review the updated statement of accepted facts and respond to questions regarding her current condition and disability.

Dr. Fried completed a work capacity evaluation on August 6, 2009 and advised that appellant could work eight hours a day with restrictions. He noted that she should limit repetitive movement of her wrist to eight hours, as well as pushing and pulling no more than 15 pounds eight hours a day while lifting no more than 5 pounds eight hours a day. In a narrative report, Dr. Fried stated that appellant had mild work-related limitations due to her accepted fracture of the left wrist with traumatic arthritis. He listed her symptoms of occasional aching, throbbing and "flare-ups." Dr. Fried noted appellant's decreased range of motion, but found good grip and pinch strength in her left nondominant hand. He stated, "I do note that she certainly is not totally disabled from the injuries that occurred in 1986."

The employing establishment offered appellant a light-duty position as a medical clerk on September 10, 2009. This position included data entry and patient documentation. The employing establishment stated that a voice-activated computer and telephone headset would be provided. The employing establishment listed appellant's physical requirements as pushing and pulling up to 15 pounds eight hours a day, lifting 5 pounds eight hours a day and eight hours of limited repetitive movement of the wrists.

In a letter dated September 11, 2009, OWCP found that the offered position was suitable and allowed appellant 30 days to accept the position or offer her reasons for refusal. 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 FECA, her right to compensation for wage loss or a schedule award would be terminated. She was given 30 days to respond. On October 21, 2009 OWCP informed appellant that she had refused to accept the offered suitable work position and that she had not offered any reasons for her refusal and allowed her 15 days to accept the position. In a letter dated October 21, 2009, counsel requested an extension based on appellant's scheduled appointment with her physician on October 29, 2009.

By decision dated December 10, 2009, OWCP terminated appellant's compensation benefits effective that date on the grounds that she refused an offer of suitable work. It noted that she had not submitted any additional medical evidence in support of her claim. Counsel requested an oral hearing on December 17, 2009. He converted this request to ask for a review of the written record on April 5, 2010. Counsel argued that appellant could not perform the duties of the offered position.

By decision dated June 17, 2010, another OWCP hearing representative affirmed OWCP's decision finding that the medical evidence established that appellant could perform the duties of the offered position.

LEGAL PRECEDENT

It is well settled that once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[3] Appellant's compensation benefits were terminated under 5 U.S.C. § 8106(c). It must establish that appellant refused an offer of suitable work. Section 8106(c) of FECA[4] provides that a partially disabled employee who refuses or

[3] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[4] 5 U.S.C. § 8106(c)(2).

neglects to work after suitable work is offered to, procured by, or secured for the employee is not entitled to compensation. Section 10.517 of the applicable regulations[5] 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 showing before a determination is made with respect to termination of entitlement to compensation. To justify termination of compensation, OWCP must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[6]

Under FECA, Congress has provided that, when there is disagreement between the physician on the part of the United States and that of the employee, "the Secretary shall appoint a third physician who shall make an examination."[7]

Under section 8123(a), the Board has recognized the discretion of the Director in appointing physicians to examine claimants under FECA in the adjudication of claims.[8] FECA does not specify how the appointment of a medical referee is to be accomplished. The implementing federal regulations, citing to the Board's decision in *James P. Roberts*, provide that development of the claim is appropriate when a conflict arises between medical opinions of virtually equal weight.[9] The regulations state:

> "If a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser or consultant, OWCP shall appoint a third physician to make an examination (see § 10.502). This is called a referee examination. OWCP will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case…."[10]

ANALYSIS

Appellant sustained injury on April 13, 1986 when she injured her left arm in the performance of duty as the result of interaction with a combative patient. OWCP accepted left forearm contusion. It also accepted fracture of the left wrist, as well as traumatic arthritis of the left wrist.

[5] 20 C.F.R. § 10.517(a).

[6] *Arthur C. Reck*, 47 ECAB 339, 341-342 (1995).

[7] 5 U.S.C. § 8123(a).

[8] *See William C. Gregory*, 4 ECAB 6 (1950).

[9] 20 C.F.R. § 10.321(a); *James P. Roberts*, 31 ECAB 1010 (1980).

[10] 20 C.F.R. § 10.321(b). OWCP will pay for second opinion and referee medical examinations, reimbursing the employee all necessary and reasonable expenses incidental to such examination. 20 C.F.R. § 10.322. *A.D.*, Docket No. 10-2286 (issued September 27, 2011).

Dr. Armas-Loughran, an attending physician, completed a duty status report and opined that appellant could not work and that the total disability was permanent. OWCP referred appellant for a second opinion examination with Dr. Rubinfeld, who diagnosed ankylosis of the right elbow at 90 degrees and found that appellant had normal range of motion, no atrophy and no sensory deficit in the left wrist and hand. Dr. Rubinfeld concluded that appellant had no disability or residuals related to her 1986 employment injury.

In order to resolve the conflict in medical opinion, OWCP referred appellant to Dr. Fried. In a report dated March 27, 2008, Dr. Fried found no swelling of the left wrist and no complaint of tenderness to palpation. He found five degrees each of flexion and extension with full supination and lacking 30 degrees of pronation. Dr. Fried examined an x-ray and found resection of the distal ulna and partial auto fusion of the distal radius with the proximal carpal row.

Based on the hearing representative's finding that the original statement of accepted facts was deficient as it did not include the additional conditions accepted by OWCP, it requested a supplemental report from Dr. Fried and provided a new statement of accepted facts. When OWCP obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, OWCP must secure a supplemental report from the specialist to correct the defect.[11] After considering the revised statement of accepted facts, Dr. Fried completed a report on August 6, 2009 finding that appellant had mild work-related limitations due to her accepted fracture of the left wrist with traumatic arthritis and listed her symptoms of occasional aching, throbbing and "flare-ups." He found that appellant could work eight hours a day with restrictions on repetitive movement of her wrist for eight hours a day, as well as pushing and pulling no more than 15 pounds eight hours a day while lifting no more than 5 pounds eight hours a day. Dr. Fried stated, "I do note that she certainly is not totally disabled from the injuries that occurred in 1986."

Dr. Fried based his report on a proper factual background and review of diagnostic tests. He listed his findings on physical examination and found that appellant had restrictions due to her accepted employment injury. The Board finds that Dr. Fried's reports are well rationalized and entitled to the special weight of the medical evidence. Based on Dr. Fried's reports, OWCP properly found that appellant was capable of light-duty work.

The employing establishment offered appellant a light-duty position comporting with the physical limitations as established by Dr. Fried. The Board finds that OWCP properly determined that the offered position was suitable as the special weight of the medical evidence established that appellant was no longer disabled from work and had the physical capacity to perform the modified duties described in the limited-duty position.

In order to properly terminate appellant's compensation under section 8106 of FECA, OWCP must provide her notice of its finding that an offered position is suitable and give her an opportunity to accept or provide reasons for declining the position.[12] The record in this case

[11] *V.G.*, 59 ECAB 635 (2008).

[12] *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff d on recon.*, 43 ECAB 818 (1992).

indicates that OWCP properly followed the procedural requirements. By letter dated September 11, 2009, OWCP advised appellant that the offered position was suitable. It notified her that, if she failed to report to work or failed to demonstrate that the failure was justified, her right to monetary compensation would be terminated and she was allotted 30 days to either accept or provide reasons for refusing the position. On October 21, 2009 appellant was given an additional 15 days in which to respond. There is therefore no evidence of a procedural defect in this case as OWCP provided her with proper notice. Appellant was offered a suitable position by the employing establishment and the offer was refused. Under section 8106(c) of FECA, her monetary compensation was properly terminated effective December 10, 2009 on the grounds that she refused an offer of suitable employment.[13]

Counsel questioned whether Dr. Fried was properly selected as the impartial specialist. He noted that Dr. Fried was selected immediately after his associate Dr. Feierstein was bypassed on the grounds that "Dr. Steven Fried is the doctor that handles IME's [impartial medical examinations]." The record reflects that in selecting the impartial medical specialist, OWCP bypassed several physicians who did not perform examinations for the Department of Labor. The selection process was documented for the record through a series of screen captures. The screen captures establish that the referral to Dr. Fried was made immediately after Dr. Feierstein. The Board notes that the physicians share an address. The Board finds that this evidence reflects that the medical scheduler properly applied OWCP medical management software to make the impartial medical selection.[14]

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly terminated appellant's wage-loss compensation pursuant to 5 U.S.C. § 8106(a).

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

[14] *See A.D., supra* note 11 (finding that a selection process documented for the record through a series of screen captures was sufficient to establish that the medical scheduler properly applied OWCP medical management software to make the impartial medical selection).

ORDER

IT IS HEREBY ORDERED THAT the June 17, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 17, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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