United States Department of Labor
Employees' Compensation Appeals Board

P.B., Appellant	)	
and	)	**Docket No. 11-1384**
	)	**Issued: January 9, 2012**
DEPARTMENT OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, Brooklyn, NY, Employer	)	

Appearances:
Paul Kalker, 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 May 25, 2011 appellant, through her attorney, filed a timely appeal from a May 6, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) 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 OWCP properly terminated appellant's compensation for wage-loss benefits for a refusal of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On July 1, 2008 appellant, then a 50-year-old claims representative, filed a traumatic injury claim (Form CA-1) alleging that she sustained injuries on June 26, 2008 when a chair

[1] 5 U.S.C. § 8101 *et seq.*

slipped backward and she fell to the floor. OWCP accepted the claim for sprains of the neck, lumbar back, right shoulder and upper arm and left knee and leg. Appellant worked intermittently commencing September 9, 2008 and underwent left knee surgery on June 3, 2009. She stopped working and began receiving compensation for total disability as of June 7, 2009.

In a report dated January 15, 2010, Dr. Michael Katz, an orthopedic surgeon selected by OWCP for a second opinion regarding disability for work, provided a history and results on examination. He opined that appellant continued to have an employment-related partial disability. Dr. Katz stated that she could work five hours a day in a light-duty position with no lifting of more than 15 pounds. In April 2010, OWCP referred appellant for vocational rehabilitation services. The employing establishment offered her a light-duty job at four hours a day on June 14, 2010.

OWCP referred appellant for a second opinion examination by Dr. Robert Orlandi, an orthopedic surgeon. In a report dated September 2, 2010, Dr. Orlandi provided a history and results on examination. He opined that appellant could return to work without restrictions. By letter dated September 17, 2010, OWCP requested a supplemental report from Dr. Orlandi. It noted that the accepted conditions included a neck and right shoulder injury, and requested that he also consider these conditions. In a report dated October 20, 2010, Dr. Orlandi opined that appellant did not have any musculoskeletal disability and could return to work without restriction.

In a report dated September 30, 2010, Dr. Joseph Paul, an attending orthopedic surgeon, provided a history and results on examination. He opined that appellant continued to have disability as a result of her cervical and lumbar spine, as well as the left knee. Dr. Paul concluded that the injuries were permanent in nature and causally related to the June 26, 2008 employment incident.

OWCP found a conflict existed in the medical evidence and appellant was referred to Dr. Robert Meyerson, a Board-certified orthopedic surgeon selected as a referee physician. By report dated December 9, 2010, Dr. Meyerson provided a history, review of medical records and results on physical examination. He stated that there was some residual disability from the lumbar, neck and left knee sprains, with supporting objective evidence from magnetic resonance imaging (MRI) scan results. Dr. Meyerson noted degenerative disc disease and disc herniations of the cervical spine and an L4-5 disc herniation. With respect to a cervical condition, he stated that there was "little objective evidence" relating the degenerative changes to the employment injury and it was "unclear" whether the cervical disc herniations were employment related. For the left knee, Dr. Meyerson stated that there was little objective evidence to indicate that any current disability was employment related. OWCP asked him "if there was a work-related disability" to discuss whether appellant could work limited duty. Dr. Meyerson stated that appellant should be able to work five hours a day with a 10 pound lifting restriction and 15-minute breaks every two hours to accommodate her lumbar condition.

In a letter dated January 5, 2011, OWCP asked Dr. Meyerson to clarify his opinion regarding employment-related conditions and disability. It noted that Dr. Meyerson had stated that there were residuals from the lumbar, neck and back strains, but had also reported a lack of objective findings on causal relationship.

On March 17, 2011 the employing establishment submitted a job offer for a modified claims representative effective March 28, 2011. The job offer stated that the position was five hours a day, with no lifting more than 10 pounds and 15-minute breaks every two hours.

By letter dated March 18, 2011, OWCP advised appellant that it found the offered position to be suitable. It advised her of the provisions of 5 U.S.C. § 8106(c)(2) and stated that she had 30 days to either accept the position or provide reasons for refusing the offer.

Appellant's representative submitted a March 25, 2011 letter stating that the job offer was not consistent with appellant's medical restrictions and disability. The representative argued that Dr. Meyerson did not consider the medication appellant was taking and had scheduled her for an additional MRI scan.

By report dated April 18, 2011, Dr. Meyerson reported that an April 4, 2011 lumbar MRI scan showed an L3-4 disc herniation, which would correspond to appellant's complaints of pain and numbness in her left leg. He again opined that she could work five hours a day, with 15-minute breaks every two hours. Dr. Meyerson stated that appellant should not lift more than 15 pounds.

In a letter dated April 19, 2011, OWCP found the reasons provided by appellant for refusing the position were not valid. It stated that appellant had 15 days to accept the position or wage-loss benefits would be terminated.

By decision dated May 6, 2011, OWCP terminated compensation for wage loss on the grounds that appellant had refused an offer of suitable work under 5 U.S.C. § 8106(c)(2).

LEGAL PRECEDENT

5 U.S.C. § 8106(c) 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." It is OWCP's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[2] To justify such a termination, OWCP must show that the work offered was suitable.[3] An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[4]

Whether an employee has the physical or psychological ability to perform an offered position is primarily a medical question that must be resolved by the medical evidence. In

[2] *Henry P. Gilmore*, 46 ECAB 709 (1995).

[3] *John E. Lemker*, 45 ECAB 258 (1993).

[4] *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.517(a).

evaluating the suitability of a particular position, OWCP must consider preexisting and subsequently acquired medical conditions.[5]

ANALYSIS

The initial question is whether the offered position was medically suitable. The issue is a medical issue and must be resolved by probative medical evidence. With regards to disability, there was a disagreement between attending physician Dr. Paul and the second opinion examiner Dr. Orlandi. FECA provides that, if there is a 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 the examination.[6] Dr. Meyerson was selected for a referee examination to resolve the conflict.

In assessing the probative value of the medical evidence from Dr. Meyerson, the Board reiterates the legal precedent noted above: OWCP must consider preexisting and subsequently acquired conditions. Unlike many medical issues under FECA, where there is a sharp distinction between employment-related conditions and nonemployment-related conditions, a proper evaluation of the medical evidence in a case involving 5 U.S.C. § 8106(c)(2) must consider all medical conditions.

Dr. Meyerson provided an opinion that appellant could work five hours a day, with 15-minute breaks every two hours and a lifting restriction. The lifting restriction was 10 pounds in the December 9, 2010 report and 15 pounds in the April 18, 2011 report. The offered position was within these stated restrictions.

The issue, however, is whether Dr. Meyerson considered only the accepted employment-related conditions in providing the work restrictions. All of the questions posed to Dr. Meyerson by OWCP referred to accepted conditions or the June 26, 2008 employment incident. The question as to disability was stated, "If there was a work-related disability" that precluded return to her normal work duties, could appellant perform a light-duty job. It is unclear whether Dr. Meyerson's response was limited to disability which he believed to be employment related. In this regard the only condition that he clearly stated was employment related was the lumbar condition. As to the neck, he noted a number of findings, such as degenerative changes and disc herniations, but he stated there was "little objective evidence" relating the degenerative changes to appellant's employment injury and it was "unclear" whether the cervical disc herniations were employment related. As to the left knee, Dr. Meyerson stated "there was little objective evidence to suggest any current disability" related to the left knee was employment related.

OWCP asked Dr. Meyerson for a supplemental report, but the questions posed again were focused on causal relationship with employment. The Board finds that he was not sufficiently responsive in his April 18, 2011 report. Since Dr. Meyerson appeared to question

[5] *Gayle Harris*, 52 ECAB 319, 321 (2001); *Martha A. McConnell*, 50 ECAB 129, 132 (1998); *S.G.*, Docket No. 08-1992 (issued September 22, 2009).

[6] 5 U.S.C. § 8123(a). According to 20 C.F.R. § 10.321, the referral to a third physician is called a referee examination and the physician selected has no prior connection with the case.

whether the current neck or left knee conditions were employment related, it is unclear whether his opinion as to disability was limited to disability from a lumbar condition, or whether he factored into work restrictions the neck, left knee or any other medical condition. The questions posed to Dr. Meyerson suggested that OWCP was only concerned with employment-related disability. OWCP should have requested clarification and simply asked Dr. Meyerson for an opinion as to work restrictions without regards to causal relationship with the employment injury.

It is OWCP's burden of proof to establish that the offered position was suitable. For the reasons noted, the Board finds that OWCP did not meet is burden of proof in this case.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate compensation for wage loss for a refusal of suitable work under 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 6, 2011 is reversed.

Issued: January 9, 2012
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