United States Department of Labor
Employees' Compensation Appeals Board

L.L., a.k.a., L.P., Appellant	)	
and	)	**Docket No. 13-1203**
	)	**Issued: December 6, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Houston, TX, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 19, 2013 appellant filed a timely appeal of an October 22, 2012 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 the case.

ISSUE

The issue is whether OWCP properly terminated appellant's compensation effective March 1, 2010 because she refused an offer of suitable work under 5 U.S.C. § 8106.

FACTUAL HISTORY

This case has previously been before the Board. By decision dated May 13, 1998, the Board affirmed an OWCP decision denying appellant's request for authorization for surgery, as

[1] 5 U.S.C. § 8101 *et seq.*

untimely filed and failing to establish clear evidence of error.[2] The facts as set forth in the Board's prior decision are hereby incorporated by reference.

On June 23, 1992 appellant, then a 34-year-old letter carrier, filed a traumatic injury claim alleging that she fell on her back trying to escape some wasps that had flown out of a mailbox. OWCP accepted the claim for lumbosacral strain and contusion of the back and paid compensation benefits.

In order to determine the nature and degree of appellant's employment-related disability, on November 7, 2007, OWCP referred appellant to Dr. Bernard Albina, a Board-certified orthopedic surgeon, for a second opinion. In a report dated November 27, 2007, Dr. Albina opined that appellant had chronic lumbar strain, degenerative lumbar disc disease and spondylolisthesis at L5-S1. He noted that the chronic lumbar strain was connected to the injury on the job and that the chronic pain in her lower back with intermittent lumbar radiculopathy were residuals of the employment injury. Dr. Albina gave appellant physical limitations resulting from the employment-related disability of not lifting in excess of 10 pounds and no repeated stooping and bending. He noted that appellant could probably do sedentary to light-duty type work and the potential for rehabilitation is affected by her amount of pain as well as the chronicity of the pain that she suffered as a result of her injury.

In a February 20, 2008 report, Dr. Raul Sepulveda, appellant's treating Board-certified neurosurgeon, opined that appellant suffered a herniated disc in the lumbar spine with chronic compression upon a nerve that produced chronic lumbar radiculopathy. He did not believe that the diagnosis of chronic lumbar strain by itself fully explained appellant's problems. Dr. Sepulveda noted that appellant has physical limitations and that she had to take significant analgesics and that this prevented her from driving safely. He opined that, at this point, he did not feel it was safe for her to be in a working environment given the amount of medication she had to take. Dr. Sepulveda did believe that appellant could perform sedentary-type activities, but believed that these activities should be in a safe environment, such as her house. Accordingly, there existed a conflict between Drs. Sepulveda and Albina with regard to whether appellant should return to work.

On August 21, 2008 OWCP referred appellant to Dr. James Hood, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated October 8, 2008, Dr. Hood noted that the current diagnosis from the work injury is lumbar sprain. He noted that he did not have the imaging films, so it was impossible to determine if appellant had spondylolisthesis at its origin. Dr. Hood questioned appellant's use of Bioflex gel, Vicodin (with Tylenol) and Xanax. He did not believe that appellant should be off work. Specifically, Dr. Hood opined that to be off work since 1992 because of soreness in one's back without neurological abnormalities is indefensible. He opined that appellant could work at a sedentary level which allows for an occasional lifting of 1 to 10 pounds but that appellant cannot at this time return to unrestricted duties as a letter carrier. In a work capacity evaluation of the same date, Dr. Hood indicated that appellant could work eight hours a day, but did limit walking to one hour; standing; bending/stooping and twisting to two hours; and reaching, including reaching

[2] Docket No. 96-1887 (issued May 13, 1998).

above shoulder, to six hours. He also indicated that appellant should take a 15-minute break every two hours.

On September 9, 2008 OWCP awarded appellant a schedule award for a two percent impairment to the right lower extremity and a two percent impairment to the left lower extremity. However, it noted that appellant was currently in receipt of compensation payments, and that a schedule award and compensation payments cannot be paid simultaneously. OWCP also advised appellant that, if she elected retirement benefits, she could collect schedule award benefits concurrently, but that she must indicate her desire in writing.

Appellant continued to be treated by Dr. Sepulveda for chronic aching, burning and occasional sharp low back pain with radiation into both legs. He continued to list appellant's problems as herniated lumbar disc and aftercare, long term use of medications.

On August 3, 2009 the employing establishment made an offer of limited duty to appellant for work as a letter carrier. She would case the route, answer telephones and perform customer service. The physical requirements of the modified assignment were standing, reaching above the shoulder and fine manipulation limited to two hours, and communicating with customers limited to six hours.

On January 26, 2010 appellant refused the modified assignment, contending that it was against her doctor's advice to accept the position. She noted that she was in a lot of pain and on medication and that her doctor did not want her to be in a work environment. Appellant contended that she would not be able to do the job and that she is retired.

On February 9, 2010 OWCP informed appellant that the duties of the position offered by the employing establishment were within appellant's restrictions as set by Dr. Hood, that the employing establishment confirmed that the position remained available to her, and that she should either accept the position or provide a written explanation of reasons for refusing the position within 30 days.

By letter dated March 5, 2010, appellant contended that OWCP did not send Dr. Hood all her medical reports that he refused the ones that she attempted to give him and that she saw Dr. Hood for only 15 minutes but had been seeing her physician for 10 years. She argued that her doctor contended that it was not safe for her to be in a work environment; that she had nerve damage in her right leg which was resulting in falls; that she is always in pain in her back radiating down her legs; that she suffers from a lot of pain in her knee shooting in to her hip; that she cannot stand and case for two hours; and that her doctor till did not want her to reach above her shoulder.

By letter dated March 17, 2010, OWCP noted that appellant's reasons for not accepting the position were not valid and it gave her an additional 15 days to report to the assignment.

On August 18, 2010 OWCP terminated appellant's compensation and for wage loss and schedule awards effective March 1, 2010 because the evidence established that she refused to accept suitable work.

By letter dated October 6, 2010, appellant requested an oral hearing before an OWCP hearing representative. OWCP's Branch of Hearings and Review denied this request as untimely in a decision dated December 27, 2010.

In a February 2, 2011 report, Dr. Sepulveda continued to list his impressions as herniated lumbar disc and lumbar back pain. He opined that appellant was unable to stand up for the required two hours to case mail, was unable to do overhead work for more than very limited periods of time and that her ability to work with customers was at least partially limited due to the fact that she has to take Trazadone and Xanax as adjuvants for control of pain as well as the use of Hydrocodone which could possibly affect her ability to make decisions. In a May 12, 2011 decision, Dr. Sepulveda listed his impressions as herniated lumbar disc and aftercare, long-term use, medications necessary.

By letter dated February 3, 2011, appellant requested reconsideration. She stated that she was trying to receive the schedule award that had already been awarded to her.

By decision dated September 7, 2011, OWCP denied appellant's request for reconsideration as the evidence was insufficient to warrant modification of the prior termination decision dated August 18, 2010.

Appellant continued to submit reports by Dr. Sepulveda. In an August 31, 2011 report, Dr. Sepulveda listed his impression as aftercare, long-term use of medications and herniated lumbar disc. He reiterated these impressions in reports of November 30, 2011 and February 29, 2012. In his November 30, 2011 report, Dr. Sepulveda also noted that appellant needed to have a workup for her hips to include a magnetic resonance imaging (MRI). He informed appellant that the workup should be done with private insurance as there is no evidence that this problem is related to her employment injury.

On September 5, 2012 appellant again requested reconsideration. She contended that her doctor told her not to accept the job offer on February 3, 2011. Appellant stated that she was tricked into choosing retirement benefits. She stated that she needs two hip replacements and was not physically able to accept the job offer. Appellant contended that she was still suffering from the same pain multiplied by 100 and still uses a cane for assistance with walking.

By decision dated October 22, 2012, OWCP denied modification of the previous decisions.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[3] Section 8106(c)(2) of FECA[4] provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or

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

[4] 5 U.S.C. §§ 8101-8193.

secured for the employee is not entitled to compensation.[5] OWCP may not terminate compensation without establishing that the disability ceased or that it is no longer related to the employment.[6] The Board has started 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).[7]

Section 10.517(a) of FECA'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.[8] 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.[9]

In situations where there are 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 on a proper factual background, must be given special weight.[10]

ANALYSIS

OWCP found a conflict in medical opinion arose between Dr. Sepulveda, appellant's treating physician, and the second opinion physician, Dr. Albina, with regard to appellant's ability to work. Accordingly, it referred appellant to Dr. Hood to resolve the conflict. In an August 21, 2008 report, Dr. Hood found that appellant could work at a sedentary level which allowed for an occasional lift of 1 to 10 pounds. He noted that, while the initial MRI scan indicated a paracentral protrusion, at this time there was no focal nerve root compression or mass effect on the exiting nerve roots, and that this has held through on subsequent imaging studies indicating only minimal disc bulge. Dr. Hood stated that she relates that she has nerve damage, but there was no evidence of that, noting that the EMG nerve conduction study done after the work accident was normal. He noted that in addition to this, appellant had a normal neurological examination with no significant signs of radiculopathy or neurological compromise. As this impartial opinion is based on a proper factual and medical background it is, therefore, entitled to special weight.[11] The Board finds that the position offered by the employing establishment was specifically set within the restrictions as advised by Dr. Hood. Accordingly, OWCP properly relied upon the opinion of Dr. Hood, the impartial medical specialist, in determining that

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

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

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

[8] 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 6.

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

[10] *Anna M. Delaney*, 53 ECAB 384 (2002).

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

appellant had failed to accept suitable employment at the position with the employing establishment and in terminating her compensation benefits.

The Board further notes that OWCP 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 medical evidence submitted after the termination of compensation benefits is insufficient to outweigh the well-rationalized opinion of the impartial medical examiner, Dr. Hood. On reconsideration, appellant submitted multiple reports by her treating physician, Dr. Sepulveda, who continued to list his impressions as herniated lumbar disc and lumbar back pain. In a February 2, 2011 report, Dr. Sepulveda opined that appellant was unable to stand the required two hours to case mail; that she was unable to do overhead work for more than very limited periods of time and that her ability to work with customers was limited due to the fact that she was on medication that would affect her ability to make decisions. As he was on one side of the conflict that Dr. Hood resolved, his report is insufficient to overcome that of Dr. Hood or to create a new medical conflict.[13]

On reconsideration, appellant contended that she needed two hip replacements. However, her claim has not been accepted for an injury to her hips. In fact, Dr. Sepulveda, appellant's attending physician, specifically stated that appellant's hip problems were not related to her employment injury.

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 compensation effective March 1, 2010 because she refused an offer of suitable work under 5 U.S.C. § 8106.

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

[13] *See S.J.*, Docket No. 09-1794 (issued September 20, 2010) (submitting a report from a physician who was on one side of a medical conflict that an impartial specialist resolved is generally insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict). *See also Michael Hughes*, 52 ECAB 387 (2001); *Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992); *Dorothy Sidwell*, 41 ECAB 857 (1990).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 22, 2012 is affirmed.

Issued: December 6, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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