United States Department of Labor
Employees' Compensation Appeals Board

M.W., Appellant	)	
and	)	**Docket No. 12-502**
	)	**Issued: January 16, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Marysville, WA, Employer	)	

Appearances:
Howard L. Graham, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 10, 2012 appellant, through her attorney, filed a timely appeal from a November 10, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP), which affirmed an April 15, 2011 decision finding that she refused suitable work. Pursuant to 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 April 15, 2011 on the grounds that she refused suitable work.

FACTUAL HISTORY

On June 26, 2007 appellant, then a 47-year-old rural carrier, injured her left arm after she was involved in a motor vehicle accident with a bicyclist. OWCP accepted abrasion of the left shoulder and arm and expanded her claim to include adjustment disorder with depressed mood

and post-traumatic stress disorder. Appellant stopped work on June 26, 2007 and was placed on the periodic rolls and received appropriate compensation benefits.[1]

Appellant was treated by Dr. George W. Vasil, a Board-certified family practitioner, from July 6, 2007 to November 30, 2010, for stress after her work-related motor vehicle accident. Dr. Vasil diagnosed stress reaction, depression and insomnia. On September 17, 2010 he advised that appellant was ready to return to work but, in reports dated November 19 and 30, 2010, he noted that she had increasing stress and was not ready to return to work. Appellant was treated by Dr. John L. Shelton, a licensed psychologist, from February 17 to November 23, 2010, for adjustment disorder, post-traumatic stress disorder and anxiety disorder that developed after her work injury. In addition to anxiety, she was clinically depressed and had trouble driving. Dr. Shelton noted that appellant was angry at her employing establishment for not caring about her or the injured cyclist and this served as a major barrier to returning to work. He diagnosed adjustment disorder, post-traumatic stress disorder, anxiety disorder, obesity and health and work concerns. Dr. Shelton hoped to return appellant to work in some capacity.

On December 1, 2010 appellant requested that the employing establishment send her a job offer and refer her for a medical examination.

On December 1, 2010 the employing establishment offered appellant a limited-duty position as a rural carrier, four hours per day, with a tour of duty from 1:00 p.m. to 5:00 p.m. Monday through Friday and 11:15 a.m. to 3:15 p.m. on Saturday at the Marysville location. The job was effective December 13, 2010. The duties of the job included working in the automated postal center, answering questions and assisting customers for three hours per day, stocking inventory in the lobby and carrier supplies for .25 hours per day, resolving customer inquiries or complaints for .5 hours a day and filing certified/second notices for .25 hours a day. Appellant accepted the job on December 9, 2010 and returned to work but noted that this was against the recommendation of Drs. Shelton and Vasil. She worked four hours per day as a modified rural carrier and stopped work on December 22, 2010 on the advice of her psychiatrist.

In reports dated December 1 and 8, 2010, Dr. Shelton recommended that appellant begin psychiatric medication but noted difficulty in finding a physician that would accept a workers' compensation case. On December 15 and 22, 2010 he noted that she was treated by Dr. Jon Berner, a Board-certified psychiatrist, who took appellant off work for six months to implement a medication regimen to control her anxiety. In a December 9, 2010 report, Dr. Vasil noted her complaints of panic attacks and diagnosed adjustment disorder with depressed mood and insomnia.

The employing establishment asked that appellant provide current medical restrictions. Appellant submitted reports from Dr. Shelton dated December 29, 2010 to February 9, 2011, who noted her fear of returning to work. On January 19, 2011 Dr. Shelton advised that she was able to drive to physician's appointments and that her driving was not at the level of being a disability. In a January 19, 2011 duty status report, he noted findings of anxiety and depression. Dr. Shelton diagnosed adjustment disorder and post-traumatic stress disorder and noted that

[1] Appellant filed a separate occupational disease claim in 2002, which was accepted for carpal tunnel syndrome, claim number xxxxxx830.

appellant was not able to work. On February 9, 2011 he noted that she reported being able to work full time, without restrictions, performing her job as a rural carrier at Granite Falls location. In a January 10, 2011 duty status report, Dr. Vasil noted diagnoses and indicated that appellant was unable to resume work because she could not drive over 15 minutes a day and had personal interaction problems. In a January 10, 2011 report, he diagnosed adjustment disorder with depressed mood and post-traumatic stress disorder. Dr. Vasil noted that appellant returned to work for less than two weeks and was taken off work by Dr. Berner.

OWCP referred appellant to Dr. Douglas Robinson, a Board-certified psychiatrist, for a second opinion. In a February 8, 2011 report, Dr. Robinson noted that her affect was spontaneous, with no evidence of depressed mood or irritability, her thought content was logical and goal directed and speech had normal volume. Appellant reported nightmares but with a rehearsed or practiced quality and her emotional concern appeared to be more about employment difficulties. diagnosed: Axis 1: panic disorder with agoraphobia and adjustment disorder with depressed mood; Axis 2: dependent personality disorder with some elements of borderline personality disorder; Axis 3: diabetes and obesity; and Axis 4: psychological stressors, possible childhood abuse and abusive relationship with husband. He advised that appellant had a pattern of distorting or misrepresenting circumstances to suit various ends. Dr. Robinson opined that the majority of appellant's avoidance of driving was unrelated to the accident but was related to her panic disorder and agoraphobia. He noted no objective findings of post-traumatic stress disorder due to the accident and no evidence of adjustment disorder with depressed mood. Dr. Robinson opposed taking appellant off work for six months as proposed by Dr. Berner because there was no way for appellant to avoid the initial shock of going to work every day. He noted that appellant had a dependent personality, harbored grievances and synthesized perceptions of unfair treatment which contributed to her motivation to remain off work. Dr. Robinson opined that she was capable of driving and returning to her original job full time and suggested a graduated program to reintroduce her to the workforce for four hours per day. In a work capacity evaluation dated February 8, 2011, he noted that appellant could return to her regular job with graduated hours beginning with four hours per day and increasing to eight hours per day.

Appellant submitted a January 14, 2011 report from Dr. Shelton who diagnosed post-traumatic stress disorder and advised she continued to have work-related residuals. In a February 16, 2011 report, Dr. Shelton noted that she reported being able to work full time, without restrictions, performing her rural carrier job but only at the Granite Falls location.

In a February 25, 2011 letter, OWCP advised appellant that the December 1, 2010 job offer was suitable work. It noted that she initially accepted the job but stopped work on December 22, 2010. Appellant was informed that she had 30 days to accept the job or provide reasons for refusing it; otherwise, she risked termination of her compensation.

Appellant submitted an employing establishment form dated January 10, 2011 prepared by Dr. Vasil, who diagnosed adjustment disorder with depressed mood and noted her residuals had not resolved. Dr. Vasil was unsure of the expected recovery date. In duty status report's dated January 14 and March 21, 2011, he noted clinical findings of anxiety and depression and diagnosed adjustment disorder and post-traumatic stress disorder. Dr. Vasil noted that appellant could not drive over 15 minutes per day and currently had difficulty with personal interactions. In a March 21, 2011 report, he noted diagnoses and opined that she was totally disabled. In a

January 12, 2011 form report Dr. Berner diagnosed post-traumatic stress disorder, noted that appellant had residuals of her condition and stated that the recovery time was unknown. In a January 12, 2011 duty status report he noted clinical findings of anxiety and diagnosed post-traumatic stress disorder. Dr. Berner advised that appellant was disabled. On March 9, 2011 he indicated that she presented distraught and psychomotor agitated after driving to his office. Dr. Berner diagnosed post-traumatic stress disorder, rule out partial penetrance of son's schizophrenia. He opined that appellant was officially treatment refractory for complaints of anxiety having failed a serotonin agent and discharged her from his care. In reports dated February 23 to March 16, 2011, Dr. Shelton noted her psychiatrist, Dr. Berner, released her from his care. He encouraged appellant to return to work.

In a March 24, 2011 letter, appellant asserted based on the opinion of Dr. Berner she was advised not to return to the current job offer because of her psychiatric condition.

On March 29, 2011 OWCP advised appellant the position of a limited-duty rural carrier suitable work. It noted that it considered the reasons given by appellant for refusing the position and found then to be unacceptable. OWCP afforded appellant 15 additional days to accept the job offer.

Appellant submitted a March 21, 2011 report from Dr. Vasil who diagnosed post-traumatic stress disorder, dysthymia, adjustment disorder with depressed mood and anxiety. Dr. Vasil recommended medication management by a psychiatrist and noted her symptoms were severe enough to preclude return to work. Also submitted was a March 23, 2011 letter from Dr. Shelton to OWCP who confirmed that Dr. Berner took appellant off work. Other reports from Dr. Shelton dated March 23 and 30, 2011 diagnosed anxiety and post-traumatic stress disorder. He noted Dr. Berner utilized several medications to treat appellant's condition without success and discharged her from his care.

In a April 15, 20211 decision, OWCP terminated appellant's monetary compensation, effective the same day, on the grounds that she refused an offer of suitable work.

Appellant requested an oral hearing which was held on August 10, 2011. She submitted a February 9, 2011 report form Dr. Berner who noted that she had an avoidant pattern towards driving associated with her post-traumatic stress disorder. Dr. Berner diagnosed post-traumatic stress disorder, refractory to standard clinical agents. He advised medication management was unsuccessful and recommended extensive psychological and rehabilitative intervention. In a March 21, 2011 duty status report, Dr. Vasil diagnosed adjustment disorder and post-traumatic stress disorder and advised that appellant could not work. In an August 20, 2011 report, he noted diagnoses and advised that appellant could not be released to work as the employing establishment had not offered work that she could perform. In reports dated March 16 to October 28, 2011, Dr. Vasil diagnosed situational anxiety, adjustment disorder with depressed mood and anxiety. Reports from Dr. Shelton dated April 6 to October 31, 2011, noted that appellant had panic attacks over the actions of the employing establishment and claimed her anxiety prevented her from driving. In his September 27, 2011 report, he stated that he was unsure if she was disabled.

In a November 10, 2011 decision, OWCP affirmed the April 15, 2011 decision.

LEGAL PRECEDENT

Section 8106(c) of FECA provides in pertinent part, a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for him is not entitled to compensation.[2] It is OWCP's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[3] 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.[4]

The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to future compensation and, for this reason, will be narrowly construed.[5] To establish that a claimant has refused or abandoned suitable work, OWCP must substantiate that the position offered was consistent with the employee's physical limitations and that the reasons offered for stopping work were unjustified.[6] The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence of record.[7] Additionally, it is well established that OWCP must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.[8]

To justify termination, OWCP must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[9] Section 10.516 of the regulations provide that OWCP shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter OWCP's finding of suitability. If the employee presents such reasons and OWCP determines that the reasons are unacceptable, it will notify the employee of that determination and that he or she has 15 days in which to accept the offered work without penalty. At that point in time, OWCP's notification need not state the reasons for finding that the employee's reasons are not acceptable.[10]

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[2] 5 U.S.C. § 8106(c)(2).

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

[4] 20 C.F.R. § 10.517(a).

[5] *H. Adrian Osborne*, 48 ECAB 556 (1997).

[6] *See Lizzie M. Greer*, 49 ECAB 681 (1998).

[7] *See Marilyn D. Polk*, 44 ECAB 673 (1993).

[8] *Richard P. Cortes*, 56 ECAB 200 (2004); *Gayle Harris*, 52 ECAB 319, 321 (2001).

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

[10] 20 C.F.R. § 10.516.

ANALYSIS

OWCP accepted appellant's condition for abrasion of the left shoulder and arm, adjustment disorder with depressed mood and post-traumatic stress disorder. On December 1, 2010 the employing establishment offered her a limited-duty position as a rural carrier, effective December 13 2010. Appellant accepted the job on December 9, 2010 but stopped work on December 22, 2010 on the advice of her psychiatrist. OWCP terminated her monetary compensation effective April 15, 2011, based on her refusal to return to the position. The Board finds that OWCP established that the offered position of December 1, 2010 was suitable.

OWCP referred appellant to Dr. Robinson, for a second opinion. In his February 8, 2011 report, Dr. Robinson reviewed the record and a statement of accepted facts. He examined appellant, noted findings and offered diagnoses that included panic disorder with agoraphobia and adjustment disorder with depressed mood. Dr. Robinson advised that symptoms of panic disorder with agoraphobia were mistaken for post-traumatic stress disorder and she had a pattern of distorting or misrepresenting circumstances to suit various ends. He opined that the majority of appellant's avoidance of driving had nothing to do with the accident but was related to her panic disorder and agoraphobia. Dr. Robinson noted no objective findings of post-traumatic stress disorder due to the accident and no evidence of adjustment disorder with depressed mood. He noted that appellant had a dependent personality, harbored grievances and synthesized perceptions of unfair treatment which contributed to the motivation to not work. Dr. Robinson believed that she was capable of returning to her usual job and suggested a graduated program to reintroduce her to the workforce beginning at four hours per day. He further noted that appellant was capable of driving. In a work capacity evaluation dated February 8, 2011, Dr. Robinson noted that appellant was able to return to work eight hours per day, graduated, beginning with four hours per day.

The Board finds that, under the circumstances of this case, the opinion of Dr. Robinson represents the weight of the medical evidence and establishes that appellant could work in the modified position that she stopped on December 22, 2010. Dr. Robinson reviewed the record and examined her. He clearly found that appellant could return to work subject to the restrictions set forth in his reports of February 8, 2011. The record reflects that the physical restrictions of the modified position offered to appellant on December 1, 2010 conformed with the limitations provided by Dr. Robinson. The Board finds that the physical requirements of the offered position are consistent with the work restrictions set forth by Dr. Robinson and that the offered position is medically suitable to appellant's work restrictions.

Medical evidence submitted by appellant does not adequately show that she was unable to perform the offered job. Dr. Vasil, a family practitioner, submitted various reports indicating that she could not drive for more than 15 minutes or that she could not return to work. However, he did not specifically explain the medical reasons why appellant could not perform the offered position.[11] Reports from Dr. Shelton, a clinical psychologist, also do not show that she was unable to perform the offered position. Certain of his reports generally indicated that appellant

[11] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

could not work while others indicated that she could work or encouraged her to work. In January 2011 duty status reports, Dr. Shelton indicated that she was not able to work but in his January 19, 2011 treatment record, he advised that her fear of driving was not at the level of a disability. In his October 5, 2011 report, he questioned if appellant was disabled. In none of his reports did Dr. Shelton provide medical rationale to explain why she was unable to perform the offered job. Other treatment records from Drs. Shelton and Vasil do not specifically explain how appellant's medical conditions prevented her return to work in the offered modified position at the time she stopped work on December 22, 2010 or at any time prior to the termination of benefits.

Appellant also submitted evidence from Dr. Berner, a psychiatrist. On January 12, 2011 Dr. Berner noted diagnoses and found that she was totally disabled. In February 9 and March 9, 2011 reports, he noted diagnoses and stated that appellant was treatment refractory for anxiety and discharged her from care. In none of his reports did Dr. Berner address the suitability of the offered position or explain how her medical conditions prevented her from returning to that position. Therefore, appellant did not submit any medical evidence to show that the offered position was not medically suitable.[12]

To properly terminate compensation under section 8106(c), OWCP 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.[13] It properly followed its procedural requirements in this case. On February 25, 2011 OWCP advised appellant that the modified position was suitable and allotted her 30 days to either accept or provide reasons for refusing the position.[14] On March 29, 2011 it advised her that it considered the reasons given by appellant for refusing the position and found them to be unacceptable. OWCP afforded her 15 additional days to accept the job offer. The Board finds that OWCP followed established procedures prior to the termination of compensation pursuant to section 8106(c) of FECA.

Before OWCP and on appeal, appellant asserted that the suitability process was tainted by bad faith on the part of OWCP in misrepresenting the opinion of the referral physician to her psychologist Dr. Shelton; by "[physician] shopping" for a second opinion physician; that OWCP made a retroactive finding of suitability in violation of FECA; and that OWCP did not consider appellant's work stoppage as a recurrence. The Board finds these arguments to be without merit. The Board finds no evidence in the record to support that OWCP misrepresented medical information provided to Dr. Shelton. Rather, the record reflects that Dr. Shelton coordinated appellant's physician's Dr. Vasil and Dr. Berner and with OWCP with a goal of returning appellant to work. The Board further finds that there was no evidence of "[physician] shopping." The record reflects that OWCP further developed appellant's claim after she stopped work. OWCP determined that additional medical development was necessary for a determination of appellant's ability to return to the workforce. The Board has held that OWCP has the discretion to have a claimant submit to an examination by a physician designated or approved by OWCP

[12] *See Les Rich*, 54 ECAB 290 (2003).

[13] *See Maggie L. Moore*, *supra* note 9.

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

after the injury and as frequently and at the times and places as may be reasonably required.[15] The record contains no evidence showing that appellant's referral to Dr. Robinson was inappropriate.

With regard to appellant's allegation that OWCP made an impermissible retroactive finding of suitability, the Board finds this argument to be without merit. The employing establishment offered her a part-time limited-duty position on December 1, 2010, which she accepted and returned to work and stopped on December 22, 2010. OWCP then further developed the evidence to determine if the position was suitable. After proper notices on February 25 and March 29, 2011 in which appellant was advised that, the position remained available, OWCP terminated her compensation for refusal of suitable work. Finally, appellant asserts that OWCP failed to develop her work stoppage on December 22, 2010 as a recurrence of disability in conformance with *Mary A. Howard*[16] and OWCP's procedures.[17] The Board notes that in *Howard* the Board reversed OWCP's finding that she refused an offer of suitable work based on a procedural defect by OWCP. In that case, OWCP failed to notify appellant of the provisions of section 8106(c), specifically, she was not advised that her light-duty job was considered "suitable" under section 8106(c), she was not advised of the consequences of neglecting suitable work nor was she allowed an opportunity to respond to OWCP prior to termination. The present case, is distinguished from *Howard* in that appellant was informed of the provisions of section 8106(c), in both a 30-day letter on February 25, 2011 and a 15-day letter on March 29, 2011 and provided with the opportunity to respond prior to having her monetary benefits terminated. The Board further notes that OWCP properly followed its procedures which provide that, in a case where no formal loss of wage-earning capacity decision has been issued, OWCP's claims examiner must inquire as to appellant's reasons for ceasing work and make a suitability determination. In this instance, OWCP followed the proper procedures and made a suitability determination.

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 met its burden of proof in terminating appellant's disability compensation under 5 U.S.C. § 8106(c)(2) for refusal of suitable employment.

[15] *William B. Webb*, 56 ECAB 156 (2004).

[16] 45 ECAB 646 (1994).

[17] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

ORDER

IT IS HEREBY ORDERED THAT the November 10, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 16, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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