

accepted for right ankle fracture and nonunion of right ankle fracture. Appellant received compensation for temporary total disability.

On June 14, 2010 appellant underwent right foot bone graft surgery to repair the distal fibula. The procedure was performed by Dr. J. David DeLapp, Board-certified in orthopedic surgery.

In a January 4, 2012 report, Dr. Michael Dole, Board-certified in internal medicine, advised that appellant had chronic pain syndrome. Appellant experienced chronic right ankle pain with a history of ankle fracture. Dr. Dole advised that she had been released to return to work at light to sedentary duty. He advised that Dr. Oghale Eleyae, a specialist in podiatry, ordered a pad or ankle/foot arthrosis for her right foot to ameliorate an antalgic gait. Dr. Dole stated that this was reasonable and would improve her ability to walk.

In a February 4, 2012 report, Dr. Eleyae noted appellant's history of right foot pain and trauma. Appellant developed arthritis in her right ankle and experienced sharp and burning pain with walking. Dr. Eleyae stated that she also had chronic regional pain syndrome. Appellant was restricted to a desk chair but still complained of pain and swelling to her right foot and ankle after sitting for long periods. Dr. Eleyae advised that she would not be able to continue working at light-duty limitations. He recommended that appellant be referred to her primary care physician for a disability evaluation.

In order to determine appellant's current condition and work capacity, she was referred to Dr. John P. Sandifer, Board-certified in orthopedic surgery. In a report dated February 14, 2012, Dr. Sandifer stated that she had continued complaints of right foot and ankle pain with numbness and had developed reflex sympathetic dystrophy. Appellant also had additional surgery for extensive tendon repair. Dr. Sandifer advised that she had a history of a fractured right shoulder, secondary to a fall.

Dr. Sandifer found that appellant was not able to return to her employment as a nursing assistant, but she could work at a limited sedentary job. He outlined restrictions of no standing for more than 15 to 20 minutes at a time or more than 2 hours in an 8-hour day. Dr. Sandifer asserted that appellant needed to elevate her foot and ankle frequently, during the day. In a work capacity evaluation accompanying his report, he advised that she could work eight hours a day with intermittent sitting for no more than four hours a day; walking, standing and lifting not exceeding five pounds for no more than one-hour a day; pushing and pulling not exceeding five pounds for no more than two hours a day; and no bending, stooping, squatting, kneeling or climbing.

On March 9, 2012 appellant advised the employing establishment that she was requesting leave without pay because of a right shoulder greater tuberosity fracture and in light of Dr. DeLapp's work restrictions. She stated that she would be off work for two to three months and might require surgery.

On March 14, 2012 Dr. DeLapp agreed with Dr. Sandifer's opinion that appellant could work an eight-hour day within the listed restrictions, for one year.

On March 30, 2012 the employing establishment offered appellant a job as a modified nursing assistant based on the restrictions of Dr. Sandifer and as approved by Dr. DeLapp. The job entailed calling patients to verify appointments; taking vital signs while sitting down or intermittently standing up; advising patients of their appointment time; advising patients to reschedule appointments if they cancelled; providing patients with the appointment line number to reschedule appointments; bringing specimens to the lab twice a day; communicating closely with providers and coworkers; attending a four-hour BLS class; intermittently weighing adult patients by having them step on a scale and using a computer with her left hand and arm only. The employing establishment indicated that appellant would be provided with a foot stool to elevate her right ankle and would be permitted to intermittently stand up and move around as needed.

On March 30, 2012 appellant accepted the modified job offer.

In an April 5, 2012 report, Dr. DeLapp stated that appellant still had pain and swelling in her right ankle but felt much better. Appellant's condition was essentially the same and had stabilized since her distal fibula procedure. Dr. DeLapp related that her supervisors believed that she could continue to perform light duty, though she did not think they had made any accommodations for her. He advised that appellant was under the influence of prescription narcotics and felt very distraught and anxious about her multiple problems, including her foot, ankle and hip.

Dr. DeLapp advised that x-rays of her right ankle showed a well-healed distal fibula previous nonunion, with intact hardware, no evidence of loosening and no acute bony abnormalities. Appellant had a negative bone scan for complex regional pain syndrome. Dr. DeLapp advised that she could continue at light duty pursuant to the functional capacity evaluation submitted with his report. In a Form CA-17he set forth restrictions of intermittent simple grasping and fine manipulation for four hours a day; intermittent sitting, standing and walking for no more than four hours a day; intermittent bending, stooping twisting, pulling, pushing and reaching above her shoulder for no more than one hour a day and intermittent lifting not exceeding 10 pounds for no more than one hour a day.

In a memorandum dated May 17, 2012, the employing establishment advised that appellant had accepted the modified nursing assistant's job offer on March 30, 2012 and worked that day. On April 3, 2012; however, appellant contacted her supervisor and requested that she be placed in a leave without pay status.

By letter dated June 6, 2012, OWCP advised the claimant that the offered position was suitable, advised her of the sanctions for abandoning suitable work and allowed her 30 days to reply.

On July 6, 2012 OWCP advised appellant that the modified nursing assistant job was suitable and that, pursuant to section 8106(c)(2), she had 15 days to either return to the job or provide a reasonable explanation for refusing the offer; otherwise her entitlement to compensation benefits would be terminated. Appellant did not respond.

By decision dated August 13, 2013, OWCP terminated appellant's compensation benefits on the grounds that she abandoned suitable work. It found that the position offered by the employing establishment was within her treating physician's prescribed work restrictions. The medical evidence established that appellant was capable of performing the modified nursing assistant's job. It also noted that she had been afforded the requisite 15-day notice and opportunity to comply with 5 U.S.C. § 8106(c).

By letter dated August 23, 2012, counsel requested an oral hearing, which was held on December 7, 2012. Appellant testified that she returned to work after being on disability for two to three months due to a nonwork-related right shoulder fracture. Although she accepted the job, she asserted that she was unable to work due to pain in her right foot, leg and hip and right shoulder. Appellant contended that reflex sympathy dystrophy affected her ability to work. She stated that she had become addicted to pain medication which had affected her mental condition and her ability to drive.

Following the hearing the employing establishment submitted a January 9, 2013 statement from Yvonne Johnson, an injury compensation specialist, who stated that on March 30, 2012 appellant was afforded the opportunity to return to work within restrictions provided by her treating physicians and by Dr. Sandifier, the referral physician. Appellant returned to work for one day and then requested that her supervisor place her in a leave without pay status in order to complete a course of physical therapy. With regards to the right shoulder injury referenced by appellant at the hearing, Ms. Johnson stated that management was initially made aware of it on February 16, 2012, the day prior to a previously scheduled light duty return to work. Following a period of shoulder-related disability, appellant was offered modified duty on March 9, 2012. Ms. Johnson noted that appellant accepted the job but then requested to be placed in a leave without pay status due to her shoulder injury. Finally, she asserted that appellant was given multiple opportunities to report for the modified job and that transportation options such as an agency vanpool were available to assist her in getting to and from work.

By decision dated February 20, 2013, OWCP's hearing representative affirmed the August 13, 2013 decision.

LEGAL PRECEDENT

Section 8106(c) of FECA 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."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 To justify termination, OWCP must show that the

²*Id.* at § 8106(c).

³*Joyce M. Doll*, 53 ECAB 790 (2002).

⁴20 C.F.R. § 10.517(a).

work offered was suitable and that appellant was informed of the consequences of her refusal to accept such employment.⁵ In determining what constitutes “suitable work” for a particular disabled employee, OWCP considers the employee’s current physical limitations, whether the work is available within the employee’s demonstrated commuting area, the employee’s qualifications to perform such work and other relevant factors.⁶ 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.⁷

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 medical evidence.⁸ It is well established that OWCP must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.⁹

ANALYSIS

OWCP terminated appellant’s monetary compensation effective August 13, 2013 on the grounds that she refused a March 30, 2012 offer of suitable work. It found that the weight of the medical evidence established that the modified nursing assistant’s position was within the physical restrictions set forth by Dr. Sandifer, the referral physician and by Dr. DeLapp her treating physician. The restrictions were incorporated into the March 30, 2012 job offer. The position description described the duties and physical requirements of the offered position, and Dr. DeLapp indicated that the offered position was reasonable and acceptable. While appellant asserted that pain from her nonwork-related right shoulder condition and her reflex sympathy dystrophy condition prevented her from performing the position, she submitted no medical evidence to establish that she was disabled from performing the duties of the modified job due to her shoulder condition. While she asserted at the hearing that she quit working after one day due to the effects of her right ankle and right shoulder conditions, she submitted no factual or medical evidence to support her assertion. The only contemporaneous medical evidence consists of the April 5, 2012 report from Dr. DeLapp, a treating physician, who examined appellant and noted her complaints of right ankle and right hip pain but found that she was able to perform the light-duty job as long as she adhered to her prescribed medical restrictions. Dr. DeLapp opined that appellant’s right ankle had healed since his June 2010 fusion procedure and that her condition was essentially stable and manageable. He did not address any disability due to shoulder pain. Dr. DeLapp further stated that a bone scan had ruled out a diagnosis of reflex sympathy dystrophy. OWCP properly determined that the job it offered appellant on June 6, 2012 was suitable and within her physical capabilities.

⁵*Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff’d on recon.*, 43 ECAB 818 (1992).

⁶20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB 681 (2004).

⁷*Gloria G. Godfrey*, 52 ECAB 486 (2001).

⁸*Gayle Harris*, 52 ECAB 319 (2001).

⁹*Richard P. Cortes*, 56 ECAB 200 (2004).

After OWCP established that the offered work was suitable, the burden shifted to appellant to show that her refusal was reasonable or justified.¹⁰ Appellant testified at the hearing that her right ankle, right shoulder and reflex sympathy dystrophy conditions prevented her from performing the modified nursing assistant's job. On April 5, 2012 Dr. DeLapp found that she was capable of performing light duty within her restrictions. The Board finds that appellant failed to establish that the offered position was unsuitable. Appellant's assertion that her right ankle, right shoulder and reflex sympathy dystrophy conditions prevented her from performing her job duties on March 30, 2013 is not supported by probative medical opinion. She has not provided evidence sufficient to establish that the job offered to her required performance of any duties beyond the work restrictions imposed by her physicians.

An employee who refuses or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified.¹¹ Appellant has not submitted any medical evidence indicating that her refusal to accept the March 2012 modified job offer was reasonable or justified. Accordingly, she has failed to meet her burden to provide evidence sufficient to warrant modification of the August 13, 2012 termination decision. The Board finds that OWCP properly terminated appellant's monetary compensation due to her refusal of suitable work and that she did not thereafter establish that her refusal of suitable work was justified. The February 20, 2013 decision of OWCP's hearing representative is affirmed.

CONCLUSION

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

¹⁰M.S., Docket No. 06-797(issued January 31, 2007).

¹¹5 U.S.C. § 8106(c)(2)

ORDER

IT IS HEREBY ORDERED THAT the February 20, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 15, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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