

**United States Department of Labor
Employees' Compensation Appeals Board**

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M.H., Appellant)	
)	
and)	Docket No. 14-209
)	Issued: April 11, 2014
U.S. POSTAL SERVICE, POST OFFICE, Columbia, SC, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
 RICHARD J. DASCHBACH, Chief Judge
 MICHAEL E. GROOM, Alternate Judge
 JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 4, 2013 appellant filed a timely appeal from an August 9, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 effective August 9, 2013 on the grounds that she refused an offer of suitable work under 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

OWCP accepted that on March 8, 2010 appellant, then a 49-year-old rural carrier, sustained injuries to her head, shoulder, neck and back when she passed out at work and fell.

¹ 5 U.S.C. § 8101 *et seq.*

She struck her head and left shoulder on the concrete. Appellant stopped work on March 8, 2010. OWCP accepted her claim for multiple contusions of the head and left shoulder without infection, thoracic spondylosis with myelopathy and concussion with loss of consciousness of unspecified duration. Appellant received disability compensation beginning April 24, 2010 and was placed on the periodic rolls as of September 15, 2010.

On April 19, 2011 OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. Charles Jervey, a Board-certified neurologist, for a second opinion examination. In a July 18, 2011 report, Dr. Jervey provided an accurate history of the March 8, 2010 employment injury. Upon examination, he observed that appellant's scalp was nontender to palpation and sensation was intact to pinprick throughout. Reflexes were 1 to 2+ and symmetrical throughout. Upon examination of her neck, Dr. Jervey observed full flexion but no extension, right rotation was 40 degrees and left rotation was 30 degrees. No significant tenderness to palpation was found. Dr. Jervey stated that there was no objective information to establish a significant traumatic brain injury but he did not think that appellant's injury had resolved because her symptoms persisted. Appellant stated that she appeared to be able to do at least some elements of her job, including prolonged sitting and/or standing, some walking, reaching in front of her and reaching above her head. Dr. Jervey recommended a functional capacity evaluation (FCE) to determine what restrictions should be placed.

In a September 8, 2011 FCE report, Catherine Sherlton, a physical therapist, noted appellant's diagnoses of left shoulder pain and head contusion as a result of a March 8, 2010 injury. She provided findings on examination. Ms. Sherlton stated that appellant demonstrated the ability to stand, walk, bend and squat sustained and repetitive, reach overhead, pivot and twist, push up to 45 pounds and pull up to 25 pounds. She noted that appellant could kneel, crawl, climb stairs, reach and grasp with occasional breaks and could sit and stand alternatively and use fine motor movement on a constant basis. Ms. Sherlton concluded that appellant's physical demand level was low.

In a December 27, 2011 report, Dr. Jervey reviewed the FCE and advised that appellant was able to function within the defined guidelines and limitations. In a work capacity evaluation form, he listed that she was able to perform her job with restrictions of standing up to 2.5 hours, bending and stooping for 1 to 2 hours, pushing and pulling up to 10 pounds for 2.5 hours, lifting squatting, kneeling for 2.5 hours and climbing for 3.5 hours. Dr. Jervey indicated that appellant would have to be "episode free" for six months in order to operate a motor vehicle. He also noted that she needed 10-minute breaks every 1 to 2 hours.

In reports dated September 9, 2011 to March 4, 2012, Dr. George M. Sandoz, a Board-certified neurologist, related appellant's complaints of headache and neck pain that occurred due to head trauma. Examination of the cervical spine revealed muscle spasm and moderate pain with motion. Dr. Sandoz observed no lumbar spine tenderness and normal mobility and curvature. He diagnosed unspecified disc disorder of the cervical spine and other unspecified superficial injury. Dr. Sandoz concluded that appellant was unable to work.

On May 9, 2012 OWCP found a conflict of opinion arose between Dr. Sandoz and Dr. Jervey regarding appellant's residuals and her ability to return to work. It referred her to

Dr. Marshall A. White, a Board-certified neurologist, for an impartial medical examination to resolve the conflict.

In a November 1, 2012 report, Dr. White provided an accurate history of the March 8, 2010 employment injury and a summary of the medical evidence of record. He noted that the hospital records did not appear to indicate that appellant sustained any significant sequelae as a result of the mild concussion from her fall or significant traumatic brain injury. Dr. White stated that after the employment incident accident she continued to complain of memory loss related to the reported head injury, neck pain, blurred vision and dizziness. Upon examination, he observed normal balance, reflexes, motor power and sensation throughout with no cerebellar signs present. Dr. White noted that appellant appeared quite anxious and impulsive and noted scratch marks on her necks, arms and legs, which appeared to be some type of anxiety-driven, neurocutaneous syndrome. Regarding her neck pain and headache, he reported that there was documented degenerative disease present and that the fall and subsequent stress exacerbated the degenerative arthritic condition.

Dr. White opined that appellant's continued illness was directly driven by her disability claim and symptomatology driven by the stress of her current situation. He reviewed her job duties as a rural mail carrier and opined that even prior to her accident she was incapable of performing the job. Dr. White stated that more detailed neuropsychological testing would corroborate his assertions regarding appellant's neurocognitive state and recommended formal audiology evaluation with electronystagmogram if she continued to complain of dizziness. In a work capacity evaluation form, he noted that she was able to work eight hours with restrictions of two hours of twisting, two hours of pushing and pulling up to 10 pounds and lifting up to 20 pounds. No repetitive bending or stooping, squatting, kneeling or climbing was authorized. Dr. White reported that appellant needed to take 15-minute breaks every 2 hours. He stated that she reached maximum medical improvement.

On March 25, 2013 OWCP referred appellant for vocational rehabilitation counseling.

By notice dated March 26, 2013, the employing establishment offered appellant a position as a modified rural carrier based on Dr. White's November 1, 2012 report. The duties to be performed included removing trash from work areas, lobbies and washrooms, general dusting and cleaning, grass cutting, raking and maintenance of the grounds from 7:30 a.m. to 4:00 p.m. with a 30-minute lunch break and 15-minute breaks after each 2 hours of work. The physical requirements of the position consisted of two hours of pushing and pulling up to 10 pounds and lifting up to 20 pounds. The position did not require twisting, repetitive bending or stooping, squatting, kneeling or climbing. The employing establishment noted that there was another custodian who would also be performing custodial duties that appellant may not be able to perform due to her current restrictions.

On April 3, 2012 appellant refused the offered position and stated that she would be applying for early retirement due to disability.

In a letter dated May 15, 2013, OWCP advised appellant that the offered position was suitable and that she had 30 days to either accept or provide an explanation for her refusal. It notified her that she would be paid for any difference in salary between the offered position and

her date-of-injury position. OWCP informed appellant that, if she refused suitable work without justification, it would terminate her compensation under section 8106(c)(2).

In a June 14, 2013 letter, appellant contended that Dr. White failed to address many of her mental and physical impairments and did not examine her for her memory, motor skills or agility. She reported that the job duties of dumping trash, cleaning, grass-cutting and raking were beyond her scope of abilities and that her short-term memory loss would have her wandering around forgetting who she was.

By letter dated July 19, 2013, OWCP advised appellant that her reasons for refusing the offered position were not valid. It notified her that she had 15 days to accept the position or have her compensation benefits and entitlement to disability compensation terminated.

In a July 18, 2013 report, Dr. Sandoz related that he had examined appellant since June 16, 2010 after she was involved in a work-related accident on March 8, 2010. Since the accident, appellant suffered from cervical disc and joint disease that was associated with dizziness secondary to inner ear damage. Dr. Sandoz reported that she had developed post-traumatic headaches, an impairment in memory and cognitive functions and post-traumatic stress disorder and traumatic brain injury. He advised that appellant was not able to continue with the work at the level that she did before.

In a June 16, 2010 report, Dr. Sandoz related appellant's complaints of head injury, headaches, dizziness, numbness and neck pain as a result of a March 8, 2010 trauma. He reported that she had some difficulty with ambulation and needed some assistance with activities of daily living and recommended that she remain off work. In an October 19, 2010 evaluation, Dr. Jonathan Simons, a clinical psychologist, related appellant's history of head injury following a fall. Upon examination, he observed that she had problems with episodic memory and repeated herself frequently. Dr. Simons stated that appellant was adequately oriented and that her persistence and pace appeared to be adequate, except when interrupted by memory problems. Appellant worked as a mail carrier for 24 years and stopped work following her injury. Dr. Simons opined that, following her injury, she was left with a variety of neuropsychological problems and significant memory problems. Appellant was not likely to be able to function in work situations because she would have trouble following instructions. Dr. Simons diagnosed adjustment disorder with depression and anxiety and impairment in memory and cognitive functioning.

By decision dated August 9, 2013, OWCP terminated appellant's monetary compensation effective August 9, 2013 finding that she refused an offer of suitable work under 5 U.S.C. § 8106(c)(2). It found that Dr. White's November 1, 2012 report represented the weight of medical evidence and established that she was capable of performing the duties of the modified carrier position.

LEGAL PRECEDENT

According to FECA, once OWCP accepts a claim and pays compensation, it has the burden of justifying termination or modification of an employee's benefits.² Section 8106(c)(2) of FECA provides in pertinent part that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to compensation.³ It is OWCP's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.⁴ 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.⁵

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.⁶ 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.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 the medical evidence of record.⁸ Additionally, it is well established that OWCP must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.⁹

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.¹⁰ The opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹¹ When OWCP obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in medical

² *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

³ 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

⁴ *Joyce M. Doll*, 53 ECAB 790 (2002).

⁵ 20 C.F.R. § 10.517(a).

⁶ *H. Adrian Osborne*, 48 ECAB 556 (1997).

⁷ *See Linda Hilton*, 52 ECAB 476 (2001); *Lizzie M. Greer*, 49 ECAB 681 (1998).

⁸ *See Marilyn D. Polk*, 44 ECAB 673 (1993).

⁹ *Richard P. Cortes*, 56 ECAB 200 (2004); *Gayle Harris*, 52 ECAB 319, 321 (2001).

¹⁰ 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

¹¹ *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

evidence and the specialist's opinion requires clarification or elaboration, OWCP must secure a supplemental report from the specialist to correct the defect in the original report.¹²

ANALYSIS

OWCP accepted that appellant sustained for multiple contusions of the head and left shoulder without infection, thoracic spondylosis with myelopathy and concussion with loss of consciousness of unspecified duration as a result of a March 8, 2010 employment injury. Appellant stopped work and received compensation on the periodic rolls. By decision dated August 9, 2013, OWCP terminated her compensation for wage-loss benefits on the grounds that she refused an offer of suitable work under 5 U.S.C. § 8106(c)(2).

OWCP found that a conflict in medical opinion between appellant's treating physician, Dr. Sandoz, who opined that appellant was totally disabled and the second opinion examiner, Dr. Jerve, who found that she could return to full duty with restrictions. It properly referred appellant to Dr. White for an impartial medical examination to resolve the medical conflict.

In a November 1, 2012 report, Dr. White reviewed appellant's history and provided an accurate history of the March 8, 2010 employment injury. He noted that following the work injury she continued to complain of memory loss, neck pain, blurred vision and sensation. Dr. White reported that upon examination appellant exhibited normal balance, reflexes, motor power and sensation throughout with no cerebellar signs. Regarding appellant's neck pain and headache, he noted that there was documented degenerative disease present and that the fall and subsequent stress exacerbated the degenerative arthritic condition. Dr. White stated that there was no evidence of significant permanent injury. He reviewed appellant's job duties as a rural mail carrier and opined that prior to her accident she was incapable of performing the job. In a work capacity evaluation form, Dr. White indicated that she was able to work eight hours with restrictions.

The Board finds that Dr. White's opinion is not sufficiently to resolve the conflict in medical evidence or to establish that appellant was capable of performing the offered custodial position. Dr. White stated that she was unable to perform the duties of her rural carrier position before the accident but recommended that she return to work with restrictions. The Board notes that he failed to adequately explain his how appellant was not capable of work before her March 8, 2010 employment injury but was now capable of limited duty.

When OWCP obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in medical evidence and the specialist's opinion requires clarification or elaboration, OWCP must secure a supplemental report from the specialist to correct the defect in the original report.¹³ The Board notes that Dr. White recommended more detailed neuropsychological testing to corroborate his findings and a formal audiology evaluation with electronystagmogram. OWCP did not, however, seek further clarification of these issues or refer

¹² *Raymond A. Fondots*, 53 ECAB 637, 641 (2002); *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232 (1988); *Ramon K. Ferrin, Jr.*, 39 ECAB 736 (1988).

¹³ *Id.*

appellant for further testing and evaluation as suggested by Dr. White. Because Dr. White's report is not sufficiently rationalized, his opinion is insufficient to resolve the conflict in medical evidence.¹⁴

The Board notes that OWCP did not adequately consider how appellant's medical conditions affected her ability to perform the job duties of the offered position. It is well established that all preexisting and subsequently acquired impairments, whether work related or not, must be considered in assessing the suitability of an offered position.¹⁵ OWCP did not adequately consider whether appellant's neuropsychological conditions affected her ability to perform the modified carrier position. Appellant submitted reports by Drs. Sandoz and Simons, which indicate that she has a variety of neuropsychological conditions which affect her memory and cognitive functioning.

The Board finds that as a medical conflict remains unresolved and the medical evidence does not clearly establish that the modified carrier position was within appellant's capabilities, OWCP did not meet its burden of proof to terminate her wage-loss compensation under 5 U.S.C. § 8106(c)(2).

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation effective August 9, 2013 on the grounds that she refused an offer of suitable work.

¹⁴ See *A.G.*, Docket No. 9-1599 (issued May 11, 2010).

¹⁵ See *Richard P. Cortes*, 56 ECAB 200 (2004); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4(c)(7) (June 2013).

ORDER

IT IS HEREBY ORDERED THAT the August 9, 2013 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 11, 2014
Washington, DC

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

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

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