United States Department of Labor
Employees' Compensation Appeals Board

S.H., Appellant	)	
and	)	**Docket No. 15-329**
	)	**Issued: June 5, 2015**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Minneapolis, MN, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On December 1, 2014 appellant filed a timely appeal from the August 22, 2014 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 appellant refused an offer of suitable work and is therefore not entitled to compensation under 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On December 7, 1993 appellant, then a 47-year-old licensed practical nurse, filed an occupational disease claim alleging that her left leg became numb from her hip to her toes.

[1] 5 U.S.C. § 8101 *et seq.*

OWCP accepted her claim for left subtrochanter bursitis and iliosacral strain.[2] Appellant received compensation for temporary total disability on the periodic rolls.

In August 2010, Dr. Raymond R. Fletcher, a Board-certified orthopedic surgeon and second opinion physician, evaluated appellant and found that she remained totally disabled for all work. Appellant's subjective complaints correlated with objective findings and were supported by several abnormal musculoskeletal findings. There was no evidence of secondary gain. Appellant demonstrated no nonphysiologic findings. She provided good voluntary effort and was cooperative during the evaluation. Dr. Fletcher completed a work capacity evaluation stating that appellant was not able to work. He found that she had reached maximum medical improvement and that her disability was permanent.

A conflict later arose between Dr. John C. Huntwork, the attending Board-certified internist specializing in rheumatology, and Dr. Eugene T. Saiter, a Board-certified orthopedic surgeon and second opinion physician. In May 2012, Dr. Huntwork found that appellant remained disabled for all work: "I do not think she can do any job, whether part or full time, with or without restrictions." He explained that there was no treatment plan to facilitate her recovery and return to productive, suitable employment because such a plan was not a realistic expectation, as was established in the past. Dr. Huntwork found appellant's problems to be stable and permanent. Dr. Saiter found that the accepted conditions had not resolved and that she was stable and stationary. He believed there were no forms of treatment that would cause significant improvement. Nonetheless, Dr. Saiter found that appellant was able to work four hours a day with restrictions. He completed a work capacity evaluation showing her physical limitations. Dr. Saiter did not anticipate an increase in the number of hours appellant would be able to work.

Appellant was separated from the employing establishment and moved from Minnesota to Mississippi in 1997. In February 2013, the employing establishment contacted the Gulf Coast Veterans Health Care System in Biloxi, Mississippi, to inquire whether they could place her in a position that was within her restrictions.[3] Gulf Coast advised that it had no positions in which to place appellant.

The employing establishment then offered appellant a part-time position as a telemetry monitor technician at her former duty station in Minneapolis. Appellant refused the offer. She argued it would be a hardship to move from Mississippi. Appellant also argued that she could not perform the physical demands of the position, which can involve walking, pushing, bending, standing, and moderate lifting.

The employing establishment requested a suitability determination from OWCP. It advised that it had attempted to find a federal job within a better commuting area for appellant at the Gulf Coast Veterans Health Care System in Biloxi. The employing establishment noted that the medical center in Jackson, Mississippi, was a three-hour drive from Gulfport.

[2] OWCP later identified the accepted conditions as enthesopathy of the left hip region, disorders of sacrum, and lumbosacral spondylosis without myelopathy.

[3] Appellant had not renewed her license.

To resolve whether appellant was totally disabled for all work, OWCP referred her, together with the case record and a statement of accepted facts, to Dr. Donald C. Faust, a Board-certified orthopedic surgeon with a subspecialty in hand surgery, who evaluated her on October 29, 2013. Dr. Faust related her history, functional capacities, and present complaints. Appellant was able to drive and get around. She was able to walk about the house. Appellant could take out light trash, no more than 10 pounds. Surgery had helped her back pain.

Dr. Faust described his findings on physical examination. Appellant walked well with minimal dorsiflexion weakness apparent on the left. She was able to heel and toe stand, dorsiflexing her toes better than her ankle. Appellant showed no paraspinous spasm. She could laterally bend her back 40 degrees, extend 10 degrees, and forward flex 45 degrees both standing and kneeling. Appellant had diminished pinprick sensation on the lateral aspect of the left lower extremity with weak dorsiflexion of the ankle. Straight leg raising hurt at 90 degrees. An evaluation of hip or sacroiliac joint pathology was negative. Appellant had no tenderness along the trochanter or sciatic notch.

Dr. Faust reviewed appellant's medical record, including the reports of Dr. Fletcher, Dr. Huntwork, and Dr. Saiter. He noted that she appeared to be active and independent. Dr. Faust believed that the accepted trochanter bursitis had resolved, but appellant still suffered from left foot weakness related to her 1993 work exposure. He also found that she was capable of gainful employment "as outlined in her work capacity evaluation." When asked specifically about the conflict between Dr. Huntwork and Dr. Saiter, Dr. Faust repeated that he thought appellant was capable of gainful employment. Specifically, he found that she was capable of performing the duties of the offered position of telemetry monitor technician. Dr. Faust added: "I would restrict [appellant] from lifting more than 20 [pounds] and would not require her to sit for more than 1 to 1/2 hour[s] with a 5[-] to 10[-]minute break."

In a supplemental report, Dr. Faust clarified that appellant was capable of performing the modified work for eight hours a day.

On February 25, 2014 the employing establishment offered appellant a full-time position as a telemetry monitor technician at her former duty station in Minneapolis. It advised that the Gulf Coast Veterans Health Care System in her commuting area had been contacted and "at the present time" did not have any vacancies that would be appropriate for her and her restrictions. The employing establishment informed appellant that her relocation expenses would be authorized and paid by the Veterans Affairs Health Care System in Minneapolis.

Appellant refused the job offer. She explained that it would be an emotional hardship for her to leave her significant other, with whom she had lived for the last 17 years. Appellant also argued that she could no longer perform the offered job as of January 2014 because of her low back.[4] She had to have a lumbar nerve block in February and was to have it repeated to hold off her back pain so she could walk. Appellant noted that she was seeking retirement benefits.

[4] In March 2014, appellant informed OWCP of an incident in which she bent over in a recliner to pick up a laptop and felt a painful pull in her back. An x-ray showed severe stenosis. Appellant's doctors told her not to bend at all, as it was pressing on her nerves. Appellant had eight injections after the incident and was having some bladder incontinence at night.

OWCP notified appellant that it had reviewed the job offer and found it suitable to the medical limitations given by Dr. Faust in his October 29, 2013 report because the work duties were well within the sedentary level. It contacted the employing establishment to confirm that the offered position remained available. After notifying appellant of the provisions of 5 U.S.C. § 8106(c)(2), OWCP advised that appellant had 30 days to accept the offer or provide a written explanation for not accepting.

In June 2014, Dr. Huntwork provided a report that was nearly identical to his report in May 2012. He added his understanding that appellant had an independent medical evaluation at some point, "but the nature of her problems over time are such that, in my opinion, they could not be adequately assessed by a single *ad hoc* evaluation, no matter how competent the examiner."

In July 2014, OWCP informed appellant that it had considered the reasons she provided for refusing to accept the offered position and did not find them to be valid. It advised that the position remained available and that she now had 15 days to accept and report to the position. "If you do not accept and report to the position during the allotted period, your entitlement to wage loss and schedule award benefits will be terminated."

Dr. Huntwork submitted an office note dated May 20, 2014. Appellant presented with osteoarthritis affecting the low back and hip, the symptoms of which were intermittent and the severity of which was incapacitating. The primary symptoms were pain, stiffness, and functional limitations. Associated symptoms included fatigue, morning stiffness, and urinary symptoms. Problems in the past few months included an episode of severe back and gluteal pain associated with incontinence. Appellant received pain injections, which substantially relieved her pain, and she was no longer incontinent. Noting that she was sent by OWCP to a physician who found she could work eight hours a day including two hours of lifting and carrying weights up to 20 pounds, Dr. Huntwork found that the basis of those conclusions, in a single contact with the patient and with her history, was obscure. He diagnosed lumbago and thoracic or lumbar radiculitis. "The idea that [appellant] has recovered the capacity to work, lost 18 years ago at this point, seems absurd. If one wanted to argue that she was never incapacitated, that would at least be intellectually honest, if, in my opinion, erroneous." Dr. Huntwork advised that appellant was to limit her weight bearing. Appellant was to avoid activities that required repetitive bending, lifting, stooping, pushing, and pulling. "Even if she could accomplish these once or twice, or for a brief period of time, her history, age, etc. preclude her from engaging in such activities which would only invite additional injuries."

After confirming once more that the position remained available, OWCP issued a decision on August 22, 2014 terminating appellant's wage-loss compensation and entitlement to any schedule award for refusing suitable work.

On appeal, appellant notes that Dr. Huntwork and two workers' compensation doctors found that she could not work. She asks the Board to review the medical reports from Dr. Fletcher, Dr. Huntwork, Dr. Saiter, and Dr. Faust.

LEGAL PRECEDENT

Section 8106(c)(2) of FECA provides that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by, or secured for her is not entitled to compensation.[5] OWCP has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be terminated, however, it has the burden of demonstrating that the employee can work and setting forth the specific restrictions, if any, on the employee's ability to work. OWCP also has the burden of establishing that a position has been offered within the employee's work restrictions and setting forth the specific job requirements of the position.[6] In other words, to justify termination of compensation under Section 8106(c)(2), which is a penalty provision, it has the burden of showing that the work offered to and refused or neglected by appellant was suitable.[7]

If possible, the employing establishment should offer suitable reemployment in the location where the employee currently resides. If this is not practical, it may offer suitable reemployment at the employee's former duty station or other location.[8]

If the job offer is for a site outside of the claimant's residential area, the employing establishment must document that it first searched for suitable employment in the claimant's geographic area before it settled for a position outside of it. It must provide this information to OWCP.[9]

If there is 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 an examination.[10] When there exist 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 upon a proper factual background, must be given special weight.[11]

ANALYSIS

As Dr. Fletcher, the second opinion orthopedic surgeon, confirmed in 2010, appellant was totally disabled for all work. Although he believed that her disability was permanent, a

[5] 5 U.S.C. § 8106(c)(2).

[6] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

[7] *Glen L. Sinclair*, 36 ECAB 664 (1985).

[8] 20 C.F.R. § 10.508.

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4.a(2) (June 2013).

[10] 5 U.S.C. § 8123(a).

[11] *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

conflict in medical opinion later arose between Dr. Huntwork, the attending internist, and Dr. Saiter, the second opinion orthopedic surgeon, on the extent of appellant's capacity to perform work. To resolve this conflict, OWCP referred appellant to an impartial medical specialist, Dr. Faust, an orthopedic surgeon.

It was Dr. Faust's opinion that appellant was no longer totally disabled for all work. He noted that she appeared to be active and independent. Appellant was able to drive and get around and walk about the house and take out light trash. Surgery in 2009 had helped her back pain. Appellant still had minimal dorsiflexion weakness apparent on the left. She also had diminished pinprick sensation on the lateral aspect of the left lower extremity, and positive straight leg raising hurt at 90 degrees, but she walked well and showed no paraspinous spasm. Although her claim was accepted for left subtrochanter bursitis and iliosacral strain, appellant now showed no tenderness along the trochanter or sciatic notch, and an evaluation of hip or sacroiliac pathology was negative.

The evidence thus supported Dr. Faust's opinion that the accepted trochanter bursitis had resolved and that appellant possessed functional capacities that allowed her to perform some kind of gainful employment. Specifically, Dr. Faust found that appellant was capable of performing the duties of the offered position of telemetry monitor technician. He found that she could perform these duties full time, so long as she lifted no more than 20 pounds and took occasional short breaks while sitting.

OWCP provided Dr. Faust with appellant's case record and a statement of accepted facts so that he could base his opinion on a proper factual and medical history. Dr. Faust reviewed the conflict between Dr. Huntwork and Dr. Saiter and came to at an unequivocal conclusion. His opinion that appellant could perform the duties of the offered position is consistent with the history of her functional capacities and her findings on physical examination. The Board finds that Dr. Faust's opinion is sufficiently well rationalized that it must be accorded special weight in resolving the conflict over the extent of appellant's capacity to work.

Dr. Huntwork objected to Dr. Faust's conclusion for two reasons. Appellant had been totally disabled for all work in the past, so it seemed absurd to think that she could recover any capability to work. Dr. Huntwork did not believe that a physician could reach such a conclusion having evaluated appellant only once.

Dr. Huntwork did not explain why a single, current evaluation of appellant was insufficient to evaluate her current physical condition. Also, Dr. Faust did more than evaluate her. He reviewed appellant's medical record, including the reports of Dr. Huntwork. Dr. Faust reviewed the statement of accepted facts. He considered the history that appellant had related to him. Dr. Huntwork did not deny that she had the capacity to perform activities of daily living, with some limits. He did not explain why, possessed of these capacities, appellant could not perform sedentary duty with restrictions and occasional breaks. Dr. Huntwork advised that she was to limit weight bearing and avoid repetitive bending, lifting, stooping, pushing, and pulling, but he did not explain how these restrictions were incompatible with a sedentary position monitoring telemetry.

The Board finds that the weight of the medical opinion evidence establishes the medical suitability of the offered position of telemetry monitor technician. The employing establishment offered the job, but appellant refused, in part because she had lived in Mississippi since 1997, and the offered position was located at her former duty station in Minnesota.

As noted previously, if the job offer is for a site outside of the claimant's residential area, the employing establishment must document that it first searched for suitable employment in the claimant's geographic area before it settled for a position outside of it. In this case, it looked for suitable employment at the Gulf Coast Veterans Health Care System in Biloxi, Mississippi, a mere 13 miles from Gulfport, but this was in February 2013. A full year later, in February 2014, the employing establishment offered appellant the telemetry monitor technician position in Minnesota. The offer stated that Gulf Coast did not have any vacancies "at the present time," but the employing establishment failed to document this. There is no evidence that the employing establishment conducted a current search for suitable employment in appellant's geographic area prior to the February 2014 offer.

Given the penalty under 5 U.S.C. § 8106(c)(2), the Board finds that not only must the availability of the offered position be current,[12] but the unavailability of suitable employment in the claimant's geographic area must be current as well. Without both, an offer outside the geographic area cannot be considered suitable. The assertion made in the February 2014 job offer that there were no appropriate vacancies in Biloxi "at the present time" is simply not established. The contact made with Gulf Coast Veterans Affairs Health Care System in February 2013 had grown stale. There is no evidence that the employing establishment made any current search for suitable employment in appellant's geographic area before settling on a position in Minnesota.

In the case of *M.R.*, Docket No. 11-1566 (issued February 8, 2012), the claimant moved to a different region within the state of New York after her injury. A few months later she declined a job offer at her previous duty station contending that it was unsuitable because it was approximately 230 miles away from her current residence. The Board reversed OWCP's termination of wage-loss compensation under 5 U.S.C. § 8106(c)(2) as OWCP had failed to determine whether suitable employment was possible in or around the claimant's residence at the time of the job offer. The Board held that it should have developed this aspect of the case before finding the offer suitable.

Although OWCP did make an attempt in the present case to determine whether suitable employment was possible in or around appellant's current location that attempt was a year old and no longer current. It did not reasonably reflect conditions at the time of the February 2014 job offer. Accordingly, the Board finds that the offered position was not established to be suitable. OWCP failed to meet its burden to justify imposing the penalty under 5 U.S.C. § 8106(c)(2). The Board will, therefore, reverse OWCP's August 22, 2014 decision.

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.0814.4.d (June 2013). After assessing the position and determining that it is a suitable offer of employment, OWCP must confirm with the employing establishment that the job remains open and available to the claimant. This must be documented in the file.

CONCLUSION

The Board finds that appellant did not refuse an offer of suitable work. OWCP did not establish that the work offered to and refused by her was suitable. Although the weight of the medical opinion evidence established the position's medical suitability, the evidence failed to establish that the employing establishment conducted any current search for suitable employment in appellant's geographic area.

ORDER

IT IS HEREBY ORDERED THAT the August 22, 2014 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 5, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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