United States Department of Labor
Employees' Compensation Appeals Board

B.P., Appellant	)	
and	)	**Docket No. 15-1096**
	)	**Issued: January 20, 2016**
U.S. POSTAL SERVICE, BULK MAIL CENTER, Pittsburgh, PA, Employer	)	

Appearances:
Martin Kaplan Esq., for the appellant
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 April 17, 2015 appellant, through counsel, filed a timely appeal from March 9 and April 7, 2015 merit decisions 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.

ISSUES

The issues are: (1) whether OWCP properly terminated appellant's compensation effective April 7, 2015 for refusing an offer of suitable work, pursuant to 5 U.S.C. § 8106(c); and (2) whether OWCP abused its discretion in denying appellant's request for authorization of a sleep study.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 29, 2006 appellant, then a 31-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on March 25, 2006 she injured the top of her head when a door closed on her head. OWCP accepted the claim for cervicalgia on June 21, 2006 and expanded the claim on June 29, 2007 and March 3, 2010 to include headache and myofascial pain syndrome, respectively. Appellant stopped work on December 12, 2006. OWCP paid wage-loss benefits as of December 13, 2006, and appellant received benefits on the periodic compensation rolls as of February 18, 2007. Appellant continued to submit documentation to OWCP regarding medical evaluations and treatment.

By letter dated June 21, 2012, Dr. Michael Hilts, Board-certified in family medicine, stated that appellant had reached maximum medical improvement and that she had permanent sedentary work restrictions. In an attached work capacity evaluation, he stated restrictions of no repetitive movements of the wrists or elbows; no pushing, pulling, or climbing; and no more than two to four hours per day of lifting, squatting, or kneeling. Dr. Hilts further noted that appellant could work eight-hour shifts, but could reach for no more than one to two hours per day and bend/stop for no more than two to four hours per day.

On April 12, 2013 the employing establishment offered appellant a modified assignment as a damaged mail processor. The duties of this assignment included up to eight hours per day of preparing return labels for damaged packages, placing labels in envelopes, sealing them, and retrieving the next label for processing. The physical requirements included reaching with no repetitive movements of the wrist and elbows of the right arm for one to two hours per day; lifting no more than 10 pounds for up to two to four hours per day, and sitting/standing for up to eight hours per day.

In a medical report dated May 15, 2013, Dr. Albert K. Bartko, Board-certified in physical medicine and rehabilitation, noted that appellant's symptoms had worsened and recommended that she be off work until further notice.

On December 2, 2013 the employing establishment again issued its job offer of April 12, 2013, with a new effective date of December 14, 2013. The offer was identical to the employing establishment's previous modified assignment offer, except that the average time spent in the listed duties was stated to be up to four hours per day rather than up to six hours per day; and the physical requirement of reaching with no repetitive movements of the wrists or elbows of the right arm was listed as occurring on average two to four hours per day rather than one to two hours per day.

By letter dated December 23, 2013, the employing establishment noted that appellant had not responded to its job offer and that it assumed she had refused the position. It requested that the claims examiner determine if the offer was suitable work within her restrictions.

On February 6, 2014 Dr. Hilts responded to an inquiry by OWCP as to appellant's capability to work. He noted:

> "In your letter you asked whether I felt she was capable of working the modified work position that you enclose involving work for four hours per day. I do think this would fit within her permanent light[-]duty restrictions which would involve sedentary work, 10 pounds physical demand level for up to eight[-]hour shifts. I see no reason why she could not work the job you have proposed."

By letter dated March 4, 2014, the employing establishment confirmed that the modified position was still open, but that it was only able to offer appellant four hours of work per day within her restrictions.

On March 10, 2014 OWCP notified appellant that it had been advised that she had refused or failed to report for an offer of suitable employment. It afforded her 30 days to accept the position and report to duty or to provide a written explanation of failure to accept the position.

By letter dated March 18, 2014, appellant, through counsel, explained that she rejected the job offer, as it was outside of her medical restrictions. Counsel explained, "[Appellant's] claim was expanded on March 3, 2010 to include myofascial pain syndrome. Dr. Hilts is an orthopedic physician and does not treat for myofascial pain syndrome. [He] referred [appellant] to Dr. Bartko, and as such he is also an authorized treating physician. Dr. Bartko continues to have [appellant] out of work due to her myofascial pain."

By letter dated June 17, 2014, OWCP notified appellant that a second opinion examination was warranted to determine whether the modified job offer was suitable work.

In a note dated August 26, 2014, Dr. Bartko recommended that appellant undergo a sleep study to rule out sleep apnea, before issuing a prescription for Percocet to help with appellant's pain. He reiterated the need for a sleep study on October 6, 2014, expressing concern that her use of prescription medication to manage pain could be deadly without knowing whether she had sleep apnea or not.

On October 9, 2014 OWCP referred appellant to Dr. Shervin Eshraghi, a Board-certified neurologist, for evaluation of whether appellant continued to suffer residuals of her accepted injuries, and whether she was capable of working her date-of-injury position. The appointment was scheduled for November 4, 2014. Appellant did not attend, but did attend the rescheduled appointment on December 18, 2014.

By letter dated November 17, 2014, OWCP notified appellant that the evidence of record was insufficient to authorize a sleep study. It stated, "A determination has been made that a second opinion examination and subsequent review by a district medical adviser (DMA) was warranted to determine if the proposed treatment is medically and/or causally related to her accepted conditions."

In a second opinion report dated December 18, 2014, Dr. Eshraghi stated that appellant's conditions of cervicalgia, headache, and myofascial pain syndrome had not resolved. He noted

that the accepted conditions were highly subjective and that there were minimal objective medical findings, other than reduced range of neck motion. Dr. Eshraghi noted that he did not have a detailed description of the proposed job offer in his possession, but that, if it fell between a sedentary and light demanding capacity, the job would be suitable for her. In an attached addendum report, he stated that he had reviewed the detailed job offer, that appellant had the ability to perform the job and its duties, and that therefore, appellant was suitable for the position.

In a record of a telephone conversation dated January 20, 2015, the employing establishment noted that the offered position was still available.

By letter dated January 29, 2015, OWCP notified appellant that the position remained open, that she had refused to accept the offered position, and that it had found her reasons insufficient for refusing to accept the offered position. It afforded her 15 days to accept or report to the position without termination of her wage-loss and schedule award benefits.

By letter dated February 3, 2015, appellant's representative noted that while OWCP had informed appellant that a second opinion examination would be conducted on the issue of authorization of a sleep study, Dr. Eshraghi's second opinion report did not contain an opinion on this issue.

On February 5, 2015 OWCP responded, noting that Dr. Bartko's September 11, 2014 report referred to a sleep study for "possible" sleep apnea, which was not an accepted condition. As such, it explained, a second opinion examination was not warranted. OWCP stated that, if Dr. Bartko believed appellant's possible sleep apnea was related to her accepted conditions, appellant could submit a report from Dr. Bartko within 30 days.

On the same date, OWCP advised appellant that she had been offered a suitable position within her work restrictions and that she had refused or failed to report to this position. It found that the weight of the medical evidence rested with Dr. Eshraghi. OWCP afforded appellant 30 days to submit additional evidence.

By letter dated March 3, 2015, counsel responded to OWCP's February 5, 2015 letters. He stated that the job offer was not valid because it did not contain the date that appellant needed to provide her agency with a decision. Further, counsel noted that the second opinion examination was in conflict with the opinion of appellant's treating physician, and that such a conflict needed to be resolved *via* an independent medical examination. With regard to OWCP's letter regarding authorization for a sleep study, he noted that OWCP advised appellant in a letter dated November 17, 2014 that the determination on authorization for a sleep study would come after a second opinion examination and review by a DMA. Counsel stated that because the second opinion physician's report did not contain an opinion on the appropriateness of a sleep study, OWCP needed to seek an addendum to the report and issue a formal decision.

In a note dated March 3, 2015, Dr. Bartko asserted that appellant was unable to return to work or work in any capacity.

On March 4, 2015 counsel elaborated that the offered position was not suitable because it was scheduled for night hours. With this letter, he attached a February 19, 2008 report from

Dr. Hilts wherein he noted that appellant had a work restriction of daytime hours only, to avoid excessive drowsiness due to pain medication. Counsel argued that as the second opinion report only addressed the physical requirements of the offered position, Dr. Hilts' opinion on the hours of work was uncontroverted.

By decision dated March 9, 2015, OWCP denied authorization for a sleep study. It stated that it had not received a detailed medical report outlining the causal relationship between her possible sleep apnea and an accepted injury.

By decision of the same date, OWCP found that appellant had refused to accept an offer of suitable work. It explained that the medical note from Dr. Bartko dated March 3, 2015, was insufficiently rationalized. OWCP noted that the report from Dr. Hilts was outdated, that he had reviewed the job offer and opined that it was suitable. It afforded appellant 15 days to accept or report to the position.

By decision dated April 7, 2015, OWCP terminated appellant's compensation benefits effective on that date for refusal of suitable work.

LEGAL PRECEDENT -- ISSUE 1

5 U.S.C. § 8106(c) 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. It is OWCP's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[2] To justify such a termination, it must show that the work offered was suitable.[3] An employee who refuses or neglects to work after suitable work has been offered to him or her has the burden of showing that such refusal to work was justified.[4]"

With respect to the procedural requirements of termination under section 8106(c), the Board has held that OWCP must inform appellant of the consequences of refusal to accept suitable work, and allow her an opportunity to provide reasons for refusing the offered position.[5] If appellant presents reasons for refusing the offered position, OWCP must inform the employee if it finds the reasons inadequate to justify the refusal of the offered position and afford her a final opportunity to accept the position.

To support termination, OWCP must show that the work offered was suitable. In determining what constitutes suitable work for a particular disabled employee, it considers the employee's current physical limitations, whether the work is available within the employee's

[2] *Henry P. Gilmore*, 46 ECAB 709 (1995).

[3] *John E. Lemker*, 45 ECAB 258 (1993).

[4] *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.124(c).

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

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]

ANALYSIS -- ISSUE 1

OWCP accepted appellant's claim for cervicalgia, headache, and myofascial pain syndrome. It found that the weight of the evidence with regard to appellant's ability to work a modified position offered by the employing establishment rested with Dr. Eshraghi, the second opinion referral physician, who concluded that the modified job offer was within appellant's medical restrictions. By decision dated April 7, 2015, OWCP terminated her compensation benefits as a result of appellant's refusal to accept this offer of suitable work.

The Board finds that OWCP met its burden of proof to terminate appellant's compensation benefits based upon her refusal to accept a suitable position within her medical restrictions based upon the opinion of Dr. Eshraghi, an OWCP referral physician. Dr. Eshraghi reviewed the history of her employment injury, medical treatment, the statement of accepted facts, and the offered position. He reported that the accepted conditions were highly subjective and that there were minimal objective medical reasons or findings, other than reduced range of neck motion. In an addendum report, Dr. Eshraghi stated that he had reviewed the detailed job offer, that appellant had the ability to perform the job and its duties, and that therefore, she was suitable for the position.

The weight of medical opinion is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts of the case, the medical history provided, the care of analysis manifested and the medical rationale expressed in support of stated conclusions.[8] Dr. Eshraghi fully discussed the history of injury, explained that there were minimal objective findings as to appellant's conditions, and confirmed that the modified job offer was within appellant's medical restrictions. The Board finds that Dr. Eshraghi's opinion represents the weight of medical evidence and establishes that the refused modified job offer upon which appellant's termination of benefits was based was in fact within appellant's medical restrictions. As such, OWCP met its burden of proof to terminate compensation for refusal of suitable work.

Appellant presented several arguments as to why she could not accept the job offer. The Board notes that Dr. Bartko submitted a March 3, 2015 document asserting that appellant could not return to work in any capacity. This document was devoid of any medical rationale. The Board has held that reports lacking medical rationale are of limited probative value.[9] As such, the Board finds that there is no conflict in medical opinion to be resolved in this case. With

[6] 20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB 681 (2004).

[7] *C.S.*, Docket No. 12-663 (issued September 25, 2012).

[8] *See K.W.*, 59 ECAB 271 (2007); *Ann C. Leanza*, 48 ECAB 115 (1996).

[9] *T.F.*, 58 ECAB 128 (2006); *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

regard to counsel's assertion that Dr. Hilts' February 19, 2008 report restricted appellant to working only during the daytime, this set of work restrictions was superseded by Dr. Hilts' later recommended restrictions of June 21, 2012, which contained no such daytime work restriction. Furthermore, Dr. Hilts later commented upon the proposed modified job offer on February 6, 2014, stating that it was within her restrictions.

In accordance with the procedural requirements under 5 U.S.C. § 8106(c), OWCP advised appellant on February 5, 2015 that it found the modified-duty job offer to be suitable and gave her an opportunity to provide reasons for refusing the position within 30 days. It advised her in a March 9, 2015 letter that the reasons that she had provided for not accepting the position were unacceptable. OWCP again informed appellant that she had 15 additional days to accept the offered position. The Board finds that OWCP followed established procedures prior to the termination of compensation pursuant to section 8106(c) of FECA.

The Board finds that the position offered was medically and vocationally suitable and OWCP complied with the procedural requirements of section 8106(c) of FECA. OWCP met its burden of proof to terminate appellant's wage-loss compensation as of April 7, 2015.[10]

LEGAL PRECEDENT -- ISSUE 2

Section 8103(a) of FECA provides for the furnishing of services, appliances and supplies prescribed or recommended by a qualified physician who OWCP, under authority delegated by the Secretary, considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of monthly compensation.[11] In interpreting section 8103(a), the Board has recognized that OWCP has broad discretion in approving services provided under FECA to ensure that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time.[12] OWCP has administrative discretion in choosing the means to achieve this goal and the only limitation on OWCP's authority is that of reasonableness.[13] Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[14]

While OWCP is obligated to pay for treatment of employment-related conditions, appellant has the burden of establishing that the expenditure is incurred for treatment of the

[10] *Supra* note 7.

[11] 5 U.S.C. § 8103(a).

[12] *See Dale E. Jones*, 48 ECAB 648, 649 (1997).

[13] *See Daniel J. Perea*, 42 ECAB 214, 221 (1990) (holding that abuse of discretion by OWCP is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or administrative actions which are contrary to both logic and probable deductions from established facts).

[14] *See Minnie B. Lewis*, 53 ECAB 606 (2002).

effects of an employment-related injury or condition.[15] Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.[16] Therefore, in order to prove that the surgical procedure is warranted, appellant must submit evidence to show that the procedure was for a condition causally related to the employment injury and that the surgery was medically warranted. Both of these criteria must be met in order for OWCP to authorize payment.[17]

ANALYSIS -- ISSUE 2

On March 9, 2015 OWCP denied authorization for a sleep study. It stated that it had not received a detailed medical report outlining the causal relationship between her possible sleep apnea and an accepted injury. OWCP had previously noted in a development letter dated February 5, 2015 that Dr. Bartko's proposed sleep study was due to "possible" sleep apnea, which was not an accepted condition. As such, it explained, a second opinion examination was not warranted. OWCP stated that, if Dr. Bartko believed appellant's possible sleep apnea was related to her accepted conditions, appellant could submit a report from Dr. Bartko within 30 days as to its connection to the accepted work conditions before the March 9, 2015 denial of authorization. No response was received.

It is appellant's burden to provide rationalized medical evidence sufficient to establish causal relation for conditions not accepted by OWCP. It is not OWCP's burden to disprove any such relationship.[18] OWCP requested a report from appellant's physicians causally linking her possible sleep apnea to the accepted conditions of cervicalgia, headache, and myofascial pain syndrome or to the incident of March 25, 2006 and afforded appellant 30 days to submit such a report. No such report was received. OWCP expressed in its letter of November 17, 2014 that a second opinion examination would be conducted on the issue of authorization of a study for possible sleep apnea. It was correct to state in its later February 5, 2015 letter that the evidence was insufficient to warrant a second opinion examination on the issue of possible sleep apnea, because that was not an accepted condition under appellant's claim.

As such, the Board finds that OWCP did not abuse its discretion in denying appellant's request for authorization for a sleep study under this claim.

CONCLUSION

The Board finds that OWCP properly terminated appellant's compensation effective April 7, 2015 on the grounds that she refused an offer of suitable work. The Board further finds that OWCP did not abuse its discretion in denying appellant's request for authorization of a sleep study.

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[15] *See Kennett O. Collins, Jr.*, 55 ECAB 648 (2004); *Debra S. King*, 44 ECAB 203, 209 (1992).

[16] *Id.*; *see also M.B.*, 58 ECAB 588 (2007); *Bertha L. Arnold*, 38 ECAB 282 (1986).

[17] *See R.C.*, 58 ECAB 238 (2006); *Cathy B. Millin*, 51 ECAB 331, 333 (2000).

[18] *Alice J. Tysinger*, 51 ECAB 638 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 7 and March 9, 2015 are affirmed.

Issued: January 20, 2016
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