

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

VICKY E. JESSIE, Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
St. Louis, MO, Employer

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**Docket No. 04-1852
Issued: September 13, 2005**

Appearances:
Vicky E. Jessie, pro se
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 19, 2004 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated April 23, 2004. Under 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 the Office properly terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On February 19, 1999 appellant, a 44-year-old letter carrier, filed a claim for benefits, alleging that she sustained a bilateral knee condition causally related to factors of her employment. The Office accepted the claim for aggravation of degenerative joint disease of both knees and for Bakers' cyst of the left knee and synovitis of the left knee. The Office authorized

surgeries appellant underwent on November 18, 1998 and April 21, 1999. The Office paid appellant appropriate compensation for total disability and placed her on the periodic rolls.¹

In a report dated May 1, 2001, Dr. Paul M. Spezia, an osteopath and the attending physician, stated that appellant had degenerative osteoarthritis, mild to moderate, in the medial compartment that prevented her from prolonged standing, squatting and bending, but did not prevent her from an eight-hour workday. Dr. Spezia advised that appellant could perform a desk job that would not include excessive lifting or carrying more than 15 pounds. He reiterated that appellant was able to return to gainful, full-time employment with the employing establishment with the above restrictions.

In a work capacity evaluation dated June 1, 2001, Dr. Spezia indicated that appellant could work an eight-hour day with the following restrictions: walking and standing for 4 hours per day, climbing 1 hour per day and squatting and kneeling for 20 minutes per day.

On July 27, 2001 the employing establishment offered appellant a job as a modified bulk mail entry unit clerk based on the restrictions outlined by the attending physician, Dr. Spezia. The job description stated that none of the duties involved bending, squatting, climbing, or kneeling, and no walking or standing for more than four hours, intermittently. Appellant could perform 8 hours of sitting and twisting, intermittently and lifting for 8 hours, intermittently, but no lifting more than 15 pounds, and minimal pulling/pushing.²

By letter to the employing establishment dated July 31, 2001, appellant requested disability retirement. She asserted that she was making the request “due to my inability to find a position within my medical capacity” and because she suffered from continual and chronic left knee pain and pain in her right knee.³

By letter dated August 6, 2001, the Office advised appellant that a suitable position was available and that pursuant to section 8106(c)(2), she had 30 days to either accept the job or provide a reasonable, acceptable explanation for refusing the offer. The Office advised appellant that it would be terminating her compensation based on her refusal to accept a suitable position which reflected her ability to work as a modified mail clerk for eight hours per day. The Office noted that, as of that date, appellant had not responded to the employing establishment’s offer. The Office stated that, if appellant refused the job or failed to report to work within 30 days without reasonable cause, it would terminate her compensation pursuant to 5 U.S.C. § 8106(c)(2).⁴

¹ By decision dated May 15, 2000, the Office terminated appellant’s compensation on the grounds that she refused an offer of suitable work. By decision dated March 5, 2001, an Office hearing representative reversed the May 15, 2000 decision and reinstated appellant’s entitlement to compensation.

² The duties of the position included: answering telephones; inputting checks; inputting deposits into permit system; fold, insert and seal duplicate statement for mailing to customers; look up balances for customers; assisting supervisors in completion of various spreadsheets; ordering supplies; and assisting supervisors in special projects.

³ The Office of Personnel Management approved appellant’s request for disability retirement on May 23, 2002.

⁴ 5 U.S.C. § 8106(c)(2).

On August 13, 2001 Dr. Spezia approved the job offer.

By letter dated September 6, 2001, appellant stated that she was submitting medical evidence regarding the health of her knee. She stated that she had attempted to receive treatment as expeditiously as possible in accordance with the Office's August 6, 2001 letter. Appellant submitted the results of a July 20, 2001 magnetic resonance imaging scan; a prescription for a limit bone scan and gallium scan dated August 29, 2001; and an August 6, 2001 blood profile report.

By letter dated September 7, 2001, the Office advised appellant that she had 15 days in which to accept the position, or it would terminate her compensation.

By letter dated September 21, 2001, appellant did not explicitly refuse to accept the job offer; however, she stated that she was attempting to find another attending physician to replace Dr. Spezia and that she was reviewing guidelines and procedures for obtaining assistance in finding a position suitable for her medical condition. She alleged that Dr. Spezia had approved the job offer even though she had only seen him once before he received his initial correspondence from the Office, which was seeking to increase her work restrictions without benefit of any examination, treatment or surgery for her medical conditions. Appellant also stated that she was not sure how she received an offer for a position that was created before the rehabilitation nurse assigned to her had a chance to review it.

By decision dated September 25, 2001, the Office terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work.

By letter dated October 25, 2001, appellant requested an oral hearing, which was held on June 25, 2002. Appellant submitted a March 20, 2002 report from Dr. Leo A. Whiteside, a specialist in orthopedic surgery, who performed total left knee replacement surgery on appellant on December 11, 2001. Dr. Whiteside related appellant's history of chronic bilateral knee pain, stated findings on examination and advised that her left knee replacement surgery went well with no complications.

By decision dated September 12, 2002, an Office hearing representative affirmed the September 25, 2001 termination decision.

In a report dated November 1, 2002, Dr. Whiteside reiterated his previous findings and conclusions and outlined restrictions of no walking more than 30 minutes, no standing for more than 2 to 3 hours and no lifting more than 50 pounds for longer than 5 minutes at a time.

By letter dated November 4, 2002, appellant requested reconsideration.

By decision dated January 30, 2003, the Office denied modification of the September 12, 2002 decision.

In a report dated March 12, 2003, Dr. Carter P. Fenton, an osteopath, discussed appellant's history of injury and stated:

“[Appellant] received a work description report from Dr. Spezia which resulted in a job offer on July 21, 2001. She was not able to do this job even with its restrictions because her knee had not responded to treatment and was continuing to deteriorate to the point that she had to have a total knee replacement on December 11, 2002. At no time since the initial injury had any definitive progress been made. Due to delays between [appellant] being able to get specific correction and appropriate treatment, she has suffered more pain and disability than she deserves.

“To my knowledge she never failed to do what she was told by her case managers and job supervisors, but she was never able to comply. Her best job offer was inappropriate for her condition and I do not understand the job description of her capabilities sent to the job, because even at that time it was apparent that a knee replacement was indicated. I did not release her for return to work, except for the earlier trials, since the onset of my treatment. Even now rehabilitation of the knee is not going well due to the prolonged effects of the injury and protraction of treatment.”

In a work capacity evaluation dated March 13, 2003, Dr. Fenton indicated that appellant was unable to work an eight-hour day due to the pain and swelling in her knee. He advised that appellant was never free of pain and could only walk for very short distances and then only with the use of a cane.

By letter dated April 6, 2003, appellant requested reconsideration.

By decision dated May 14, 2003, the Office denied modification of the January 30, 2003 decision.

By letter dated February 28, 2004, appellant requested reconsideration. Appellant submitted reports dated December 15, 2003 and February 12, 2004 from Dr. Khalida Anwar, Board-certified in physical medicine and rehabilitation. The December 15, 2003 report indicated that Dr. Anwar had given appellant an anserine bursitis injection in the left infrapatellar bursa. On February 12, 2004 Dr. Anwar related that appellant was complaining of pain to the medial and lateral side of her left knee, where she had developed anserine and infrapatellar bursitis. He stated that on examination appellant had tenderness to palpation on the infrapatellar bursa as well as anserine bursa area, with no swelling and full range of motion of the knee joint. Dr. Anwar concluded that although he attempted to ameliorate appellant's left knee pain with injections the pain would invariably return after the injections. He stated that he would attempt to improve her condition through acupuncture.

By decision dated April 23, 2004, the Office denied modification of the May 14, 2003 decision.

LEGAL PRECEDENT

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits. Under section 8106(c)(2) of the Federal Employees' Compensation Act,⁵ the Office may terminate compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.⁶ Section 10.517 of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured 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 a determination is made with respect to termination of entitlement to compensation.⁷ To justify termination, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.⁸ This burden of proof is applicable if the Office terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work.

ANALYSIS

The determination 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.⁹ In the instant case, the employing establishment located a job as a modified mail clerk for eight hours per day, which Dr. Spezia, the attending physician, approved as suitable for appellant and within her physical restrictions. The Office found that the weight of the medical evidence rested with Dr. Spezia's opinion, who found that appellant was capable of performing the modified job and returning to work within the indicated restrictions. This decision was proper, as Dr. Spezia's opinion represented the weight of medical opinion at the time of the Office's termination decision.¹⁰ Appellant asserted that Dr. Spezia had approved the job offer even though he saw her just once before she received her initial correspondence from the Office and that the Office was seeking to increase her work restrictions without benefit of any examination, treatment or surgery for her medical conditions. Her contentions are not supported by the record. The fact that the job offer for the modified mail clerk position might have been created before the rehabilitation nurse assigned to her had a chance to review it, as appellant asserted, is not relevant, as the job offer was approved by her attending physician on the basis of the medical evidence in the record. Thus, there was insufficient support for appellant's stated reasons in declining the job offer. Accordingly, her refusal of the job offer therefore cannot be deemed reasonable or justified, and the Office properly terminated appellant's compensation. The Office met its burden of proof to establish that appellant refused

⁵ 5 U.S.C. § 8101 *et seq.*

⁶ *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987).

⁷ 20 C.F.R. § 10.517; *see also Catherine G. Hammond*, 41 ECAB 375 (1990).

⁸ *See John E. Lemker*, 45 ECAB 258 (1993).

⁹ *Robert Dickinson*, 46 ECAB 1002 (1995).

¹⁰ *Barbara R. Bryant*, 47 ECAB 715 (1996).

suitable work and met its burden of proof to terminate appellant's compensation benefits pursuant to 5 U.S.C. § 8106.

Following the Office's termination of compensation, the burden of proof in this case shifted to appellant.¹¹ She submitted Dr. Whiteside's March 20 and November 1, 2002 reports, which related appellant's history of chronic bilateral knee pain, stated findings on examination and opined that the left knee replacement surgery he performed on December 11, 2001 went well with no complications. On November 1, 2002 Dr. Whiteside reiterated his previous findings and conclusions and outlined restrictions of no walking more than 30 minutes; no standing for more than 2 to 3 hours and no lifting more than 50 pounds for longer than 5 minutes at a time. These reports do not contain an opinion or finding that appellant was physically unable to perform the modified job as of the date her benefits were terminated. Dr. Whiteside's reports were therefore insufficient to diminish the opinion of Dr. Spezia that appellant could return to work as a modified mail clerk. Dr. Spezia represents the weight of the medical evidence of the suitable work offer.

Appellant also submitted the March 12, 2003 report from Dr. Fenton, who stated his disagreement with Dr. Spezia's approval of the July 27, 2001 job offer. Dr. Fenton opined that appellant was not able to do the modified mail clerk position even with the stated restrictions because her knee had not responded to treatment and was continuing to deteriorate to the point that she required total knee replacement on December 11, 2002. He stated that at no time since the initial injury had any definitive progress been made. Dr. Fenton indicated that he disagreed with the modified mail clerk job description, outlining appellant's capabilities because it was apparent that left knee replacement surgery was warranted. Dr. Fenton's report, however, does not establish that the offered job was not suitable when approved by Dr. Spezia on August 13, 2001. The fact that appellant had left knee replacement surgery a year and a half, after her attending physician approved her ability to perform the mail clerk job, does not undermine the weight of Dr. Spezia's opinion that she was capable of performing the modified position when offered. Further, there was no medical evidence of record indicating that "it was apparent that a knee replacement was indicated" at the time the modified position was offered. At the time of the suitable work job offer, there was no medical evidence of record indicating that appellant's knee condition would not allow her to perform the modified position. Furthermore, Dr. Whiteside, the Board-certified surgeon who performed the left knee replacement surgery on December 11, 2001, indicated in his March 30, 2002 postsurgery progress report that appellant had work with restrictions, which did not differ significantly from those outlined by Dr. Spezia in July 2001. Finally, the December 15, 2003 and January 12, 2004 reports from Dr. Anwar merely indicated that appellant had received injections to ameliorate the pain caused by infrapatellar bursitis of the left knee, and contain no rationalized medical opinion supporting her claim that she was unable to accept the modified job offer on July 27, 2001. Accordingly, the Office met its burden of proof to terminate compensation.

¹¹ *Talmdage Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

CONCLUSION

The Board finds that the Office met its burden to terminate appellant's compensation benefits pursuant to 5 U.S.C. § 8106.

ORDER

IT IS HEREBY ORDERED THAT the April 23, 2004 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: September 13, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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