United States Department of Labor
Employees' Compensation Appeals Board

M.N., Appellant	)	
and	)	**Docket No. 07-873**
	)	**Issued: November 9, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Beaumont, TX, Employer	)	

Appearances:
Stephen Domenic Scavuzzo, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 13, 2007 appellant, through counsel, filed a timely appeal from the Office of Workers' Compensation Programs' November 17, 2006 merit decision concerning the termination of her compensation. Pursuant to 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 effective July 9, 2005, on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On July 15, 2004 appellant, then a 40-year-old rural route carrier, filed a traumatic injury claim alleging that on July 10, 2004 she sustained an injury to her right temple and head when she was hit by an object while delivering mail. She stopped work on July 10, 2004. The Office accepted the claim for a concussion and placed her on the periodic rolls for temporary total disability by letter dated September 7, 2004.

On March 17, 2005 Donald E. Trahan, Ph.D., a treating clinical neuropsychologist, diagnosed improving adjustment disorder with depressed mood and mixed anxiety, mild traumatic brain injury, improving cognitive disorder associated with traumatic brain injury and postconcussional syndrome. He noted testing showed appellant appearing "to be doing better in many respects." Dr. Trahan further noted that while appellant is improving, she "continues to exhibit mild cognitive difficulties, as well as some psychological adjustment problems." Based upon a review of the injury history, psychological testing and examination, he concluded that appellant was capable of working. However, Dr. Trahan opined that she was unable to return to her date-of-injury position.

In a March 29, 2005 work capacity evaluation form (OWCP-5a), Dr. Trahan noted that appellant was recovering from her accepted concussion and was unable to work an eight-hour day. He concluded that she was capable of returning to work for no more than 24 hours per week within 60 days.

On April 11, 2005 the employing establishment offered appellant a modified clerk position working four hours per day three days a week. The duties included answering telephones and call bells, assisting with customer complaints, scanning checks, inputting address changes, installing carrier case labels, processing mark-ups, verifying undeliverable bulk mail and performing security and safety checks.

By letter dated April 18, 2005, the Office advised appellant the offered position was considered suitable. The provisions of 5 U.S.C. § 8106(c) were noted and she was advised to accept the position or provide reasons for her refusal within 30 days.

In response to the Office's letter, appellant submitted reports dated April 14 and May 10, 2005 by Dr. John Q. A. Webb, Jr., a treating physician and her refusal of the offered position. She refused the job on the grounds that she was unable to drive to work. Appellant also alleged that the physical requirements of the job assignment exceeded her capacity as she was unable to look up and down.

On April 14, 2005 Dr. Webb released appellant to work effective April 15, 2005. He noted that she was capable of working light duty three days a week with no driving. In a May 10, 2005 Texas Workers' Compensation Work Status Report, Dr. Webb stated that appellant was unable to return to work.

By letter dated May 12, 2005, the Office found that the reasons offered were insufficient. It also found that the May 10, 2005 form completed by Dr. Webb insufficient to support continued disability. The Office found the weight of the evidence resided with the report by Dr. Trahan who opined that appellant was capable of working part time. The Office stated that the offered job remained available and she had 15 days to accept the position or face termination of her compensation.

In a May 23, 2005 letter, appellant's counsel noted that while Dr. Trahan released her to work 24 hours per week, Dr. Webb clearly stated that appellant was not allowed to drive. As Dr. Webb restricted appellant from driving, this restriction prohibited her from driving to work as there is no "adequate public transportation where she resides." Thus, counsel concluded that the termination of her compensation is unwarranted.

Appellant subsequently submitted a May 19, 2005 report by Ron R. Ziegler, Ph.D. diagnosing chronic pain, depressive disorder and postconcussion syndrome.

In a decision dated June 16, 2005, the Office terminated compensation for wage loss effective June 9, 2005 on the grounds that appellant had refused an offer of suitable work. The Office discussed the evidence submitted on June 15, 2005 and found that the weight of the evidence rested with Dr. Trahan.

On July 13, 2005 appellant requested an oral hearing which was later changed to a request for review of the written record. She submitted additional evidence including a July 27, 2005 magnetic resonance imaging (MRI) scan of the brain, an August 16, 2005 progress note by Dr. Webb, a July 13, 2005 computerized axial tomography (CAT) scan of the brain and reports dated July 24 and August 15, 2005 by Dr. Ninan T. Mathew, an examining physician. The MRI and CAT scans of the brain were interpreted as normal. Dr. Mathew, in his July 24, 2005 report, diagnosed recurrent post-traumatic migraine headaches with depression and anxiety.

By decision dated December 28, 2005, the hearing representative affirmed the June 16, 2005 decision.

In a January 18, 2006 report, Dr. Webb diagnosed post-concussion syndrome and possible Meniere's disease.

On February 28, 2006 the Office received appellant's undated request for reconsideration along with evidence submitted in support of her request. On April 12, 2005 Dr. Webb released appellant to work three days per week effective April 13, 2005. His restrictions included no bending, lifting or extended walking.

Subsequent to her reconsideration request the Office received progress notes dated February 17 and March 7, 2006 progress note by Dr. Webb diagnosing postconcussion syndrome and headaches.

By decision dated March 22, 2006, the Office denied appellant's request for a merit review.

By decision dated November 17, 2006, the Office denied appellant's request for modification.[1]

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides at section 8106(c)(2) that a partially disabled employee who refuses or neglects to work after suitable work is offered is not entitled to compensation.[2] Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits under section 8106 for refusing to accept or neglecting to

[1] The Board notes that, following the November 17, 2006 decision, the Office received additional evidence. However, the Board may not consider new evidence on appeal. *See* 20 C.F.R. §§ 501.2(c); *Donald R. Gervasi*, 57 ECAB ___ (Docket No. 05-1622, issued December 21, 2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

[2] 5 U.S.C. § 8106(c)(2).

perform suitable work.[3] 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.[4] 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.[5]

Section 10.517(a) of the Act's implementing regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured by the employee has the burden of showing that such refusal or failure to work was reasonable or justified.[6] Pursuant to section 10.516, the employee 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]

ANALYSIS

The Office accepted that appellant sustained a concussion due to her July 10, 2004 employment injury and placed her on the periodic rolls for temporary total disability by letter dated September 7, 2004. The Office subsequently terminated her compensation, finding that she refused an offer of suitable work based on the March 29, 2005 work capacity evaluation report and March 17, 2005 report of Dr. Trahan, treating clinical neuropsychologist, and an April 12, 2005 report by Dr. Webb, a treating physician. The Board finds that the Office improperly terminated appellant's compensation.

Dr. Trahan, in his March 17, 2005 report, found that, while appellant was improving, she "continues to exhibit mild cognitive difficulties, as well as some psychological adjustment problems." He concluded that she was capable of working, but was unable to return to her date-of-injury position. In a March 29, 2005 work capacity evaluation form (OWCP-5a), Dr. Trahan indicated that appellant was capable of returning to work for no more than 24 hours per week within 60 days.

On April 12, 2005 Dr. Webb concluded that appellant was capable of working three days per week with restrictions. He, in an April 14, 2005 report, found that appellant was capable was capable of working light duty three days a week with no driving. In a May 10, 2005 Texas Workers' Compensation Work Status Report, Dr. Webb stated that appellant was unable to return to work.

Based upon the physical restrictions noted by Drs. Trahan and Webb, the employing establishment offered her a modified clerk position working four hours per day three days a

[3] *See Bryant F. Blackmon*, 56 ECAB ___ (Docket No. 04-564, issued September 23, 2005); *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

[4] *See Richard P. Cortes*, 56 ECAB ___ (Docket No. 04-1561, issued December 21, 2004); *H. Adrian Osborne*, 48 ECAB 556 (1997).

[5] *See John E. Lemker*, 45 ECAB 258 (1993); *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

[6] 20 C.F.R. § 10.517(a); *Richard P. Cortes*, 56 ECAB ___ (Docket No. 04-1561, issued December 21, 2004); *Ronald M. Jones*, 52 ECAB 190 (2000).

[7] 20 C.F.R. § 10.516; *Mary E. Woodard*, 57 ECAB ___ (Docket No. 05-1023, issued November 14, 2005).

week. However, the Office did not consider Dr. Webb's restriction of no driving when offering appellant the modified clerk position.

Under the Office's procedure and Board precedent, an inability to travel to work because of residuals of the employment injury is an acceptable reason for rejecting an offer of suitable work, if supported by the medical evidence.[8] On April 14, 2005 Dr. Webb found that appellant was capable of working light duty three days a week with no driving. His report generally supports her contention that she is unable to perform the offered position due to the restriction on driving a motor vehicle. The Office did not undertake further development of the medical evidence by requesting that Dr. Webb specifically address appellant's inability to drive. The Office made no mention of the commuting range of the offered position. In this case, the medical evidence supports that appellant is unable to drive for any amount of time. There is no evidence of record showing that any alternative transportation to the work site was available. Thus, the Office improperly terminated appellant's compensation benefits for refusing suitable work.

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation benefits effective July 9, 2005 on the grounds that she refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 17, 2006 is reversed.

Issued: November 9, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(5) (July 1996); *see Mary E. Woodard, supra* note 7; *Janice S. Hodges*, 52 ECAB 379 (2001); *Donna M. Stroud*, 51 ECAB 264 (2000).