

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

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H.D., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
HOUSTON VETERANS ADMINISTRATION)
MEDICAL CENTER, Houston, TX, Employer)

Docket No. 13-31
Issued: December 19, 2012

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 3, 2012 appellant filed a timely appeal from a June 18, 2012 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 December 18, 2011 on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On December 29, 2009 appellant, then a 66-year-old pharmacist, sustained injury to both upper extremities when she tripped and fell over a cart of medications. OWCP accepted the

¹ 5 U.S.C. § 8101 *et seq.*

claim for contusions of the right shoulder, upper arm and forearm and authorized an arthroscopic rotator cuff repair. Appellant received appropriate compensation benefits.

In a June 14, 2011 report, Dr. Marc Labbe, an attending Board-certified orthopedic surgeon, provided examination findings and work restrictions. He noted that appellant had full active range of motion of the right shoulder, wrist and hand. There was numbness in the median nerve distribution, but motor function was normal. Dr. Labbe released appellant to work at sedentary duty, with no use of the right arm and no reaching overhead with the left arm.

On June 14, 2011 the employing establishment provided appellant a job offer of transitional-duty assignment as a modified pharmacist. Appellant would perform sedentary duties, such as consult with physicians, telecare veteran patients and act as a liason between a veteran and his provider.² The offer specified that the light-duty assignment would stay in effect until she reached maximum medical improvement or until the release of updated restrictions that would allow her to increase work duties. On June 15, 2011 appellant accepted the light-duty assignment and returned to work. She stopped work again on July 20, 2011.

In a letter dated October 17, 2011, OWCP informed appellant that the duties and physical requirements of the modified pharmacist position were found to be suitable to her capabilities. It remained available to her and that she should return to the position or provide an explanation for abandoning the position within 30 days. OWCP advised appellant that, if she failed to return to the offered position or failed to demonstrate that the failure was justified, her compensation would be terminated.

The record contains a memorandum of a November 17, 2011 telephone conversation between appellant and OWCP. Appellant stated that she had to retire to care for her husband, who had cancer. OWCP informed her that she was required to work in her light-duty position for 60 days before retiring in order to avoid a charge of abandonment.

In a September 28, 2011 report, Dr. Labbe noted mild weakness in the right shoulder and diagnosed rotator cuff tear of the right shoulder. On October 28, 2011 he noted mild weakness in supraspinatus strength testing. Infraspinatus strength testing was normal. Active range of motion in forward flexion was to about 160 degrees bilaterally. Dr. Labbe stated that appellant should perform only sedentary work.

By letter dated November 21, 2011, OWCP informed appellant that she had not provided acceptable reasons for abandoning the position. It allowed her 15 days to accept the position prior to termination of benefits. Appellant was advised that no further reason for refusal would be considered.

By decision dated December 8, 2011, OWCP terminated appellant's entitlement to monetary compensation benefits, effective December 18, 2011, finding that she had failed to submit medical evidence sufficient to establish that she was disabled from performing the limited-duty job offered.

² The light-duty offer provided that appellant would not be required to reach above the shoulder or perform any lifting or carrying, pushing, pulling, standing or walking.

On May 1, 2012 appellant requested reconsideration of the December 8, 2011 decision. She denied that she had abandoned her light-duty position, noting that she had retired from her job with the employing establishment. Appellant was unaware that she was required to work her light-duty job for 60 days in order to be eligible for retirement under OWCP rules.

Appellant submitted a December 23, 2011 report from Dr. Todd E. Siff, a Board-certified orthopedic surgeon, who stated that appellant had plateaued after right shoulder arthroscopic rotator cuff repair and had reached maximum medical improvement. On examination of the right shoulder, forward flexion was to 110 degrees. Internal rotation was to L4. Appellant had no pain on cross body abduction. Dr. Siff opined that appellant had a 25 percent permanent impairment of her right upper extremity under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). The record also contains a report of an August 17, 2011 EMG/NCS.

By decision dated June 18, 2012, OWCP denied modification of its December 8, 2011 decision, finding that medical evidence established that appellant was able to perform the duties of the modified-duty position and she did not offer sufficient justification for abandoning the job.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits. It has authority under section 8106(c)(2) of FECA to terminate compensation for any partially disabled employee who refuses or neglects to work after suitable work is offered. To justify termination, OWCP must show that the work offered was suitable, that appellant was informed of the consequences of her refusal to accept such employment and that she was allowed a reasonable period to accept or reject the position or submit evidence or provide reasons why the position is not suitable.³

OWCP regulations provide factors to be considered in determining what constitutes suitable work for a particular disabled employee, include the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors.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 medical evidence.

³ See *Ronald M. Jones*, 52 ECAB 190, 191 (2000); see also *Maggie L. Moore*, 42 ECAB 484, 488 (1991), *reaff'd on recon.*, 43 ECAB 818, 824 (1992). See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.10 (July 1997) (The claims examiner must make a finding of suitability, advise the claimant that the job is suitable and that refusal of it may result in application of the penalty provision of 5 U.S.C. § 8106(c)(2), and allow the claimant 30 days to submit his or her reasons for abandoning the job. If the claimant submits evidence and/or reasons for abandoning the job, the claims examiner must carefully evaluate the claimant's response and determine whether the claimant's reasons for doing so are valid).

⁴ *Rebecca L. Eckert*, 54 ECAB 183 (2002).

OWCP procedures require that consideration be given to the kind of appointment in determining whether an offered position is suitable. For example, a written offer of modified duty will generally be considered unsuitable if the position offered is less than four hours a day when a claimant is capable of working full time; if the position is temporary when the date-of-injury position was permanent; or if the position is seasonal when the date-of injury position was permanent, full time.⁵

Once OWCP has demonstrated that the job offered is suitable, the burden shifts to the employee to show that her refusal to work is reasonable or justified.⁶

ANALYSIS

OWCP accepted appellant's claim for contusions of the right shoulder, upper arm and forearm. On June 15, 2011 appellant returned to work as a modified pharmacist. She stopped working on July 20, 2011. When OWCP informed appellant that it found the modified position to be suitable and that the job was still available, she refused to accept the offer of modified assignment. The Board finds that OWCP improperly terminated her compensation benefits for refusing an offer of suitable work.

The modified pharmacist position offered to appellant was identified as a "Transitional Duty Assignment." The offer specified that the position would stay in effect only until she reached maximum medical improvement or until the release of updated restrictions that would allow her to increase work duties. By definition, therefore, the offered position was temporary, rather than permanent.

OWCP's procedure manual provides that a temporary position will be considered unsuitable unless the claimant was a temporary employee when injured and the temporary position reasonably represents the claimant's wage-earning capacity.⁷ OWCP found this temporary position to be suitable. There is no evidence of record, however, that establishes that appellant was employed in a temporary position at the time of her original injury. Therefore, the position offered was not suitable.⁸

The Board finds that OWCP erred in terminating appellant's compensation benefits on the basis of her refusal of the temporary position. Therefore, OWCP failed to meet its burden of proof to terminate appellant's compensation benefits.

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.10 (July 1997).

⁶ 20 C.F.R. § 10.517. *See Kathy E. Murray*, 55 ECAB 288 (2004); *see also Ronald M. Jones*, *supra* note 3.

⁷ *Supra* note 5 at Chapter 2.814.4b(3) (December 1993)

⁸ *See Michael J. Geiger*, Docket No. 06-319 (issued May 16, 2006) (where appellant had been working in a permanent position on the date of injury, the Board found the temporary modified position offered to appellant to be unsuitable).

CONCLUSION

The Board finds that OWCP improperly terminated appellant's compensation benefits, effective December 18, 2011, on the grounds that she refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the June 18, 2012 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 19, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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