United States Department of Labor
Employees' Compensation Appeals Board

G.J., Appellant	)	
and	)	**Docket No. 08-1410**
	)	**Issued: October 23, 2008**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Miami, Fl, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On April 15, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' December 21, 2007 merit decision terminating her compensation effective December 21, 2007. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation effective December 21, 2007 on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

The Office accepted that on January 26, 2007 appellant, then a 22-year-old transportation security screener, sustained a lumbar strain due to lifting and searching baggage on that date. She began performing light-duty work for the employing establishment after her January 26, 2007 injury.

On February 7, 2007 Dr. Daniel J. Hauser, an attending Board-certified internist, diagnosed lumbar strain and indicated that appellant should not lift more than 25 pounds or engage in bending, squatting or twisting. He noted that appellant had full range of motion of her lumbar spine, no appreciable lumbar spasms and 5/5 strength in her legs.[1] Appellant began to receive treatment from Dr. Hubert L. Rosomoff, a Board-certified neurosurgeon, and she stopped work on May 23, 2007.

In June 8 and 11, 2007 reports, Dr. Rosomoff noted that appellant had reached maximum medical improvement and stated that her only work restriction was lifting no more than 20 pounds. He indicated that appellant could engage in lifting for eight hours per day.[2] In a July 2, 2007 report, Dr. Podrizki, an attending Board-certified physical medicine and rehabilitation physician, indicated that appellant could return to a job that did not require lifting more than 20 pounds.[3]

On July 3, 2007 the employing establishment offered appellant a full-time job as a modified-duty passenger screener.[4] The position involved monitoring passengers passing through x-ray machines and searching passengers' baggage. It restricted appellant from lifting more than 20 pounds.[5] On July 6, 2007 she rejected the offer. Appellant claimed that the duties of the offered position would aggravate her current condition and interfere with her physical therapy.

In a July 26, 2007 letter, the Office advised appellant of its determination that the modified passenger screener position offered by the employing establishment was suitable. It informed appellant that her compensation would be terminated if she did not accept the position or provide good cause for not doing so within 30 days of the date of the letter.

In an August 23, 2007 letter, appellant contended that the reports of her attending physicians established that she could not perform the duties of the offered position. She submitted copies of physical therapy reports and a medical report from March 2007, already of record. Appellant resigned from the employing establishment effective September 1, 2007 to start a job with the Department of Veterans Affairs.

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[1] The findings of April 9, 2007 magnetic resonance imaging (MRI) of appellant's lumbar spine showed disc herniations at L2-3 and L4-5 and disc bulging at L3-4.

[2] In his June 11, 2007 report, Dr. Rosomoff indicated that his recommended work restriction was preventive in nature, *i.e.*, related to pain or fear of future injury or aggravation. On June 21, 2007 Ira Kutner, a case manager at Dr. Rosomoff's office, stated that "from our perspective" appellant should have a chair at work so she could alternate between sitting and standing.

[3] Dr. Podrizki was associated with Dr. Rosomoff's office. He indicated that he preferred appellant to return to a clerical position but he did not provide any additional work restrictions.

[4] The employing establishment offered appellant other positions in the preceding months but these offers were withdrawn.

[5] The job allowed appellant to take a 15-minute break after her first 2 hours of work, a 30-minute break after her next 2 hours of work and a 15-minute break after an additional 2 hours of work. The employing establishment indicated that appellant would have a chair available for her use in the workplace.

In a November 29, 2007 letter, the Office advised appellant that her reasons for not accepting the position offered by the employing establishment were unjustified. It informed her that her compensation would be terminated if she did not accept the position within 15 days of the date of the letter. Appellant did not accept the offered position within the allotted time. In a December 21, 2007 decision, the Office terminated her compensation effective December 21, 2007 on the grounds that she refused an offer of suitable work.

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees' Compensation Act 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."[6] However, to justify such termination, the Office must show that the work offered was suitable.[7] An employee who refuses or neglects to work after suitable work has been offered to her has the burden of showing that such refusal to work was justified.[8]

ANALYSIS

The Office accepted that on January 26, 2007 appellant sustained a lumbar strain due to lifting and searching baggage on that date. Appellant stopped work in May 2007 and on July 3, 2007 the employing establishment offered her a full-time job as a modified passenger screener. The position primarily involved monitoring passengers passing through x-ray machines and searching passengers' baggage. It restricted appellant from lifting more than 20 pounds. Appellant refused the position and the Office terminated her compensation effective December 21, 2007 on the grounds that she refused an offer of suitable work.

The evidence of record shows that appellant was capable of performing the modified passenger screener position offered by the employing establishment on July 3, 2007 and determined to be suitable by the Office on July 26, 2007. In determining that appellant was physically capable of performing the modified passenger screener position around the time that it was offered, the Office properly relied on the opinions of Dr. Rosomoff, an attending Board-certified neurosurgeon, and Dr. Podrizki, an attending Board-certified physical medicine and rehabilitation physician.

In June 8 and 11, 2007 reports, Dr. Rosomoff determined that appellant's only work restriction was lifting no more than 20 pounds. He indicated that she could engage in lifting for eight hours per day.[9] In a July 2, 2007 report, Dr. Podrizki, an attending Board-certified physical medicine and rehabilitation physician, indicated that appellant could return to a job that did not

[6] 5 U.S.C. § 8106(c)(2).

[7] *David P. Camacho,* 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

[8] 20 C.F.R. § 10.124; *see Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

[9] In his June 11, 2007 report, Dr. Rosomoff indicated that his recommended work restriction was preventive in nature, *i.e.*, related to pain or fear of future injury or aggravation.

require lifting more than 20 pounds.[10] These reports show that appellant could perform the modified passenger screener position which did not require lifting more than 20 pounds.[11]

The Board finds that the Office established that the modified-duty passenger screener position offered by the employing establishment is suitable. As noted, once the Office has established that a particular position is suitable, an employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified. The Board has carefully reviewed the evidence and argument submitted by appellant in support of her refusal of the modified passenger screener position and notes that it is not sufficient to justify her refusal of the position.

Appellant argued that the reports of her attending physicians established that she could not perform the offered position. She submitted copies of physical therapy reports and a medical report from March 2007, previously of record. However, the physical therapy reports would not constitute probative medical evidence in that physical therapists are not considered physicians under the Act.[12] The March 2003 report is not relevant because it does not address appellant's ability to work around the time the modified passenger screener position was offered. With respect to appellant's contention, the Board notes that the reports of her attending physicians show that she could perform the duties of the offered position.

For these reasons, the Office properly terminated appellant compensation effective December 21, 2007 on the grounds that she refused an offer of suitable work.[13]

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation effective December 21, 2007 on the grounds that she refused an offer of suitable work.

[10] Dr. Podrizki indicated that he preferred appellant to return to a clerical position but he did not provide any additional work restrictions.

[11] On June 21, 2007 Mr. Kutner, a case manager at Dr. Rosomoff's office, stated that "from our perspective" appellant should have a chair at work so she could alternate between sitting and standing. The Board notes that this statement would not constitute probative medical evidence as the reports of a nonphysician cannot be considered in adjudicating medical matters. *See Arnold A. Alley,* 44 ECAB 912, 920-21 (1993). There is no clear evidence that Dr. Rosomoff or his associates insisted on such a work restriction, but nevertheless the employing establishment indicated that appellant would have a chair available for her use in the workplace. The offered position also allowed for periodic breaks.

[12] *See Jane A. White*, 34 ECAB 515, 518-19 (1983).

[13] The Board notes that the Office complied with its procedural requirements prior to terminating appellant's compensation, including providing appellant with an opportunity to accept the modified passenger screener position after informing her that her reasons for initially refusing the position were not valid; *see generally Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' December 21, 2007 decision is affirmed.

Issued: October 23, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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