United States Department of Labor
Employees' Compensation Appeals Board

JAMES L. BOOKER, Appellant	)	
and	)	**Docket No. 05-276**
	)	**Issued: April 7, 2005**
U.S. POSTAL SERVICE, MAIN POST OFFICE, Columbus, OH, Employer	)	

Appearances:
James L. Booker, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On November 9, 2004 appellant filed a timely appeal of the August 2, 2004 merit decision of the Office of Workers' Compensation Programs, which terminated his wage-loss compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.[1]

ISSUE

The issue is whether the Office properly terminated appellant's compensation on the grounds that he refused an offer of suitable work.

[1] The record on appeal includes evidence submitted after the Office issued the August 2, 2004 decision. The Board may not consider evidence that was not before the Office at the time it rendered its final decision. 20 C.F.R. § 501.2.

FACTUAL HISTORY

On January 9, 2003 appellant, then a 52-year-old manual distribution clerk, filed an occupational disease claim for mid and low back pain, right hip and groin pain and aggravation of left knee neuroma. Appellant stated that he changed worksites on February 16, 2002 and he immediately began experiencing more problems, which he attributed to having to walk approximately 700 feet to his work space. He identified February 27, 2002 as the date he first became aware of his condition and he stopped working on May 2, 2002. The Office accepted appellant's claim for aggravation of lumbosacral strain and he received appropriate wage-loss compensation.

On June 9, 2003 appellant's treating physician, Dr. Charles J. Kistler, Jr., a Board-certified family practitioner, advised that he could perform part-time, limited-duty work with restrictions of 10 to 20 pounds pushing, pulling and lifting. He also noted that appellant could walk no more than 50 feet. Appellant was to gradually increase his workday from four hours to eight hours over a six-week period. Dr. Kistler imposed similar restrictions on October 31, 2003. On January 5, 2004 Dr. Kistler again imposed a 20 pound lifting and carrying limitation. He also stated that appellant could sit for four hours intermittently, stand up to two hours a day and walk 50 to 100 feet one hour per day.

Dr. James H. Rutherford, a Board-certified orthopedic surgeon and Office referral physician, examined appellant on January 5, 2004. He reported that appellant had undergone bilateral total knee replacements in 1995 and 2002. The right knee was operated on in 1995 with a good result, however, according to appellant the November 2000 left knee replacement was a failure. Dr. Rutherford noted that appellant walked with a limp. Regarding appellant's current back condition, Dr. Rutherford reported that on February 27, 2002 appellant was walking long distances at his new facility and because he was favoring his left knee and had an uneven gait, he started experiencing pain in his lower back. Appellant's current chief complaint was constant lower back pain with occasional muscle spasms and occasional numbness in the right leg. Dr. Rutherford also noted that appellant weighed 310 pounds. Additionally, he noted continued tenderness and limitation of motion in appellant's lower back. Dr. Rutherford found that appellant continued to suffer residuals of his accepted condition of aggravation of lumbosacral strain. He also stated that appellant was not capable of performing his date-of-injury job as a manual distribution clerk. Dr. Rutherford stated that appellant was limited to sedentary activities with lifting up to 15 pounds occasionally. He also indicated that appellant could walk one hour out of eight and occasionally stand. Dr. Rutherford prohibited stooping or bending below knee level or climbing or crawling for work activity. Appellant had full use of his upper extremities and he was permitted to drive his own vehicle, but he could not operate heavy equipment. Dr. Rutherford added that because of the poor result of appellant's left total knee arthroplasty, his ability to ambulate was significantly limited. He also submitted a January 13, 2004 OWCP-5c in which he reiterated that appellant had a poor result from a left total knee arthroplasty and weighed 310 pounds and as a result he could only walk about 50 yards at one time.

The Office instructed the employing establishment to prepare a job offer for appellant that was consistent with Dr. Rutherford's findings. On March 8, 2004 the employing establishment offered appellant a limited-duty position as a distribution clerk. The position

involved eight hours of casing letters into a manual case, one hour of placing letter trays on to a ledge and one hour sweeping the case as necessary. The noted physical requirements included an average of two hours of lifting up to 15 pounds, eight hours sitting and one hour standing.

On the advise of his physician, appellant rejected the offer on March 13, 2004. He indicated that the offered position was the same as his prior job and he could not walk back to the unit or sweep. Appellant provided a March 10, 2004 disability slip from Dr. Kistler, who indicated that he advised appellant not to accept the March 8, 2004 job offer because both he and Dr. Rutherford found that appellant could not walk more that 100 to 150 feet and the unit appellant was assigned to was 650 to 700 feet from the front of the building. Dr. Kistler also noted that he had requested that appellant be provided a mobility scooter, but this had not been offered and the job description specifically omitted Dr. Rutherford's limitation of 50 yards walking.

In a letter dated April 8, 2004, the employing establishment advised the Office that the unit appellant would work in under the March 8, 2004 job offer was located approximately 500 to 700 feet from the door. The employing establishment also advised that it was aware that appellant had a walking restriction of 150 feet and his doctor had requested a motorized scooter.

In a report dated April 30, 2004, Dr. Kistler reiterated that appellant was limited in his ability to walk and that Dr. Rutherford expressed a similar opinion. He also indicated that appellant would need a wheel chair or some sort of motorized vehicle. The Office denied the requested motorized scooter, however, on May 25, 2004 the Office informed Dr. Kistler that it would authorize a regular wheel chair to accommodate appellant's restrictions for a maximum of four months.

On June 8, 2004 the Office advised appellant that it considered the March 8, 2004 job offer suitable to his work capabilities. Appellant was advised that he had 30 days to accept the position or submit any medical documentation in support of his inability to perform the duties.

At the Office's request Dr. Rutherford examined appellant again on June 9, 2004. He noted, among other things, that appellant had lost 50 pounds since his last examination in January 2004. Appellant continued to have tenderness and limitation of motion in his lower back, with only 40 degrees of flexion. Dr. Rutherford again found that appellant continued to suffer from residuals of his accepted condition. He also noted that a recent electromyography described bilateral L5 radiculopathy and possible myalgia paresthetica, but this was unrelated to the accepted condition. Dr. Rutherford also reiterated that appellant was limited to walking 50 yards because of his failed left total knee arthroplasty and would require a motorized cart to get to his workstation. With regard to appellant's back condition, he imposed the same restrictions originally reported on January 5, 2004.

On July 8, 2004 the Office advised appellant that his reasons for rejecting the March 8, 2004 were not justified. The Office informed appellant that he had 15 days to accept the position otherwise compensation benefits would be terminated.

In a report dated July 9, 2004, Dr. Kistler reiterated the need for walking restrictions and a motorized scooter, but disagreed with Dr. Rutherford's opinion that appellant's limited

mobility was due to a failed knee replacement. Dr. Kistler attributed appellant's problems to his back.

In a decision dated August 2, 2004, the Office terminated appellant wage-loss compensation based on his refusal to accept an offer of suitable employment. The Office found that the position was consistent with the restrictions imposed by Dr. Rutherford. The Office also noted that while appellant was restricted to walking only 50 yards at a time, this limitation was not related to his accepted employment injury.[2]

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[3] Under section 8106(c)(2) of the Federal Employees' Compensation Act the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[4] To justify termination of compensation, the Office must show that the work offered was suitable[5] and must inform appellant of the consequences of refusal to accept such employment.[6] An employee who refuses or neglects to work after suitable work has been offered or secured for him has the burden of showing that such refusal or failure to work was reasonable or justified.[7] Additionally, the employee shall be provided the opportunity to make such a showing before entitlement to compensation is terminated.[8]

ANALYSIS

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] Additionally, it is well established that the Office must consider preexisting and subsequently acquired conditions in determining the suitability of an offered position.[10]

The Board finds that the March 8, 2004 job offer is not suitable for appellant because it does not take into account his walking limitation of 50 yards. According to Dr. Rutherford this limitation is not related to appellant's accepted back condition, however, the Office must

[2] On July 30, 2004 the Office verified that the March 8, 2004 job offer remained available.

[3] *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

[4] 5 U.S.C. § 8106(c)(2); 20 C.F.R. § 10.517(a) (1999).

[5] *Arthur C. Reck*, 47 ECAB 339 (1996).

[6] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1972).

[7] 20 C.F.R. § 10.517(a) (1999).

[8] 20 C.F.R. §§ 10.516, 10.517(b) (1999); *John E. Lemker*, 45 ECAB 258, 263 (1993).

[9] *See Gayle Harris*, 52 ECAB 319, 321 (2001); *Maurissa Mack*, 50 ECAB 498 (1999).

[10] *See Gayle Harris, supra* note 9; *Martha A. McConnell*, 50 ECAB 129 (1998).

consider preexisting and subsequently acquired conditions in determining whether the offered position is suitable. Both Dr. Rutherford and Dr. Kistler found that appellant was limited in his ability to walk and that a motorized scooter would be necessary in order for him to perform his required duties. Additionally, the employing establishment acknowledged that appellant's workstation under the March 8, 2004 job offer was approximately 500 to 700 feet from the door. These are the same working conditions that precipitated appellant's accepted back injury. The Office would not approve a motorized scooter, but it agreed to provide a manual wheelchair for a limited period of time.

As the March 8, 2004 job offer does not mention appellant's walking restriction nor does it specifically provide for the use of any particular equipment, either manual or motorized, to allow appellant to move about the workplace, the Board finds that the offered position is not consistent with the restrictions imposed by Drs. Kistler and Rutherford. Accordingly, the March 8, 2004 position is not suitable for appellant and the Office failed to carry its burden to justify termination of compensation.

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation.

ORDER

IT IS HEREBY ORDERED THAT the August 2, 2004 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 7, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member