United States Department of Labor
Employees' Compensation Appeals Board

D.B., Appellant	)	
and	)	**Docket No. 07-983**
	)	**Issued: February 15, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Austin, TX, Employer	)	

Appearances:
Alan J. Shapiro, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 28, 2007 appellant filed a timely appeal from an Office of Workers' Compensation Programs hearing representative's January 16, 2007 decision, which affirmed the termination of his compensation on the grounds that he refused an offer of suitable work. 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 effective June 3, 2006 on the grounds that he refused an offer of suitable work.

FACTUAL HISTORY

On July 2, 2003 appellant, then a 35-year-old maintenance mechanic, felt pain in his lower back while he was lifting and installing mailboxes into cemented ground.[1] He was

[1] The record reflects that appellant has a Veteran's Administration disability of 100 percent to the right femur.

released to limited duty on July 3, 2003 with restrictions of no repetitive lifting over 30 pounds. On July 31, 2003 the Office accepted his claim for lumbar strain. On April 27, 2004 the Office accepted spondylolisthesis and displacement of lumbar intervertebral disc without myelopathy. Appellant underwent authorized surgery for a herniated nucleus pulpsous at L5-S1 and spondylolisthesis on April 15, 2004, which was performed by his treating physician, Dr. Scott Spann, a Board-certified orthopedic surgeon. He received appropriate compensation benefits.[2]

On October 13, 2004 appellant accepted a limited-duty assignment as a modified maintenance mechanic for six hours per day. The position included sitting, standing, reaching and lifting of no more than 30 pounds. Appellant returned to full-time limited duty on November 30, 2004; however, he sustained a subsequent injury on December 14, 2004 when he picked up a box at work.

In a February 10, 2005 report, Dr. Anthony Hicks, an occupational medicine specialist and treating physician, indicated that appellant could occasionally sit-stand or walk and lift up to 10 pounds. On February 16, 2005 Dr. Hicks indicated that appellant could work for eight hours per day, with restrictions that included no lifting. On March 9, 2005 he advised that appellant should be "off duty for therapeutic rest." In reports dated March 14 and April 6, 2005, Dr. Hicks indicted that appellant was totally disabled beginning March 9, 2005. He checked the box "yes" in response to whether appellant's condition was caused or aggravated by an employment injury. In an April 15, 2005 treatment note, Dr. Hicks also advised that appellant had depression that was reactive to injury. In a May 10, 2005 report, he opined that appellant could not work "indefinitely."

On May 23, 2005 the Office referred appellant to Dr. Clark Race, a Board-certified orthopedic surgeon, for a second opinion examination. In a June 7, 2005 report, Dr. Race noted appellant's history and diagnosed: failed back syndrome status post L5-S1 fusion with chronic low back pain; neurogenic bladder probably related to the L5-S1 spondylolisthesis and subsequent surgery; history of chronic back problems preceding the date of injury and chronic pain syndrome. He conducted a physical examination and determined that appellant had a well-healed scar, with no superficial tenderness and restricted lumbar range of motion with extension and flexion of only 10 degrees. Dr. Race opined that the effects of appellant's work-related injury had not ceased as he had persistent bladder dysfunction that developed after the work injury. He advised that the prognosis for recovery was limited in view of appellant's ongoing pain symptoms and the fact that he had no appreciable improvement of his back pain since his surgery. Dr. Race noted that the effects of his work injury had not ceased and would prevent appellant from returning to work as a maintenance mechanic as he was not able to bend, lift, stoop or do any other physical activities required of the position. He also indicated that appellant was taking narcotics, which made driving difficult but opined "if he could be weaned from his narcotics" that it was "possible that [appellant] could work in a sedentary type of position for two to four hours per day with frequent breaks to stand up and move around." Dr. Race noted that a functional capacity evaluation would be of limited value and opined that it could be utilized to

[2] The fusion resulted in appellant having residual bladder dysfunction. On January 26, 2005 appellant underwent a cystoscopy to rule out bladder outlet obstruction.

determine appellant's sitting tolerance. However, he advised that based upon his clinical examination, appellant would have an onset of back pain after sitting for more than 30 minutes and he would not be unable to stand or walk for more than about 10 to 15 minutes at a time. Dr. Race advised that a trial use of a spinal cord stimulator might help appellant function at a higher level for a sedentary type of position and, if he demonstrated marked improvement, then the implantation of a spinal cord stimulator would be a reasonable alternative. In an accompanying June 7, 2005 work restriction evaluation, Dr. Race advised that appellant could work two to four hours daily within restrictions.

Dr. Hicks continued to treat appellant and found that he was unable to work. In reports dated June 15 and July 21, 2005, he indicated that the claimant continued to be totally disabled for work. In reports date November 15, 2005 and January 9 and 19, 2006, Dr. Hicks indicated that appellant should be off duly for therapeutic rest."

By letter dated August 16, 2005, the Office requested an opinion from Dr. Hicks regarding the recommendation for a trial of a spinal cord stimulator and an opinion as to whether appellant could return to two to four hours of sedentary work.

On September 8, 2005 Dr. Hicks opined that appellant was "unable to work at all at present." He noted that, if better pain control was found, then sedentary duty could be attempted on a limited basis. Dr. Hicks continued to advise that appellant was unable to work.

On January 31, 2006 the Office referred appellant along with a statement of accepted facts and the medical record to Dr. Eradio Arredondo, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve a conflict in medical opinion between Dr. Hicks, who opined that appellant was totally disabled and Dr. Race, the second opinion physician, who opined that he could work two to four hours a day in a sedentary position.

By letter dated February 6, 2006, the Office paid appellant compensation for total disability beginning March 14, 2005.

In a March 1, 2006 report, Dr. Arredondo noted appellant's history of injury and treatment, which included epidural steroid injections, bladder problems and depression. He conducted a physical examination and determined that appellant's gait was normal, there was no atrophy of muscles, negative straight leg raising (SLR) and no sensory or motor loss of the lower extremities. Dr. Arredondo diagnosed chronic low back pain with neurogenic bladder residuals. He opined that "there is an explanation as to why he is still in chronic pain." Dr. Arredondo noted that there was "no objective evidence of any serious injury to his dorsal and lumbar spine, from a second injury as he described it." He opined that appellant was capable of returning to do sedentary and light-duty work full time and driving. Dr. Arredondo noted that he would limit lifting and repetitive bending and stooping to no more than two hours per day. He advised that appellant could push and pull no more than 50 pounds and lift no more than 20 pounds. Dr. Arredondo opined that he did not "see that [appellant] has any good reason to be restricted." He stated that appellant should not be on habit forming medications.

On March 2, 2006 Dr. Hicks repeated his opinion that appellant was unable to work.

On March 23, 2006 the employing establishment provided appellant with a modified job offer effective that same date, doing mail search, vacuum reader and feeder modules of delivery automation and equipment and other duties within his limitations to include paperwork and computer data entry. The position also included opening equipment doors; minor bending, stooping and twisting to remove lose mail from equipment for less than two hours. Additionally, appellant would also pull and push a small vacuum of 10 to 15 pounds on wheels to and from equipment to remove dust, debris and loose mail from equipment. The position also included completing paperwork and data entry as required. The lifting requirement indicated that appellant would be lifting less than 50 pounds.

By letter dated March 29, 2006, the Office advised appellant that Dr. Arredondo opined that he could return to part-time sedentary work and that it had requested that the employing establishment provide appellant with a modified job offer in accordance with the restrictions provided by Dr. Arredondo.

On March 31, 2006 appellant informed the Office that he was unable to return to modified work as he was approved for disability retirement. He also advised the Office that his doctor would not release him to return to work.

By letter dated April 3, 2006, the Office advised appellant that the modified maintenance position had been found to be suitable to his capabilities and was currently available. The Office rated that, Dr. Arrendondo, had examined appellant on March 1, 2006 and provided work restrictions that were consistent with the offered position. Appellant was advised that he should accept the position or provide an explanation for refusing the position within 30 days. The Office informed appellant that if he failed to accept the offered position and failed to demonstrate that the failure was justified, his compensation would be terminated.

On April 3, 2006 appellant rejected the modified job offer and alleged that he was approved for disability retirement effective March 10, 2006. He also alleged that his physician was not releasing him to return to work.

In a letter dated April 4, 2006, the employing establishment advised the Office that appellant retired on March 10, 2006.

By letter dated May 4, 2006, the Office informed appellant that his reasons for refusing the position were not acceptable and allowed an additional 15 days for him to accept the position. Appellant was advised that the weight of the medical evidence rested with Dr. Arredondo, the impartial medical examiner. He was advised that no further reason for refusal would be considered. Appellant did not respond.

By decision dated May 23, 2006, the Office terminated appellant's entitlement to monetary compensation benefits, effective June 10, 2006, on the basis that he had refused suitable work. The Office determined that the report of Dr. Arredondo, the impartial medical examiner, represented the weight of the evidence.

On May 30, 2006 appellant requested a hearing that was held on November 9, 2006. At the hearing, his representative contended that Dr. Arredondo's report was insufficient to be the weight of the medical evidence. He alleged that Dr. Arredondo did not consider all of the factors

in appellant's case, including both his employment and nonemployment-related factors. For example, the representative alleged that Dr. Arredondo did not explain why appellant was in chronic pain and that he did not note all of the factors in appellant's case, including his service-connected fracture of the right femur, his residual bladder dysfunction, chronic pain syndrome and psychological condition. He also alleged that Dr. Arredondo did not make an analysis of the job offer.

In a letter dated December 18, 2006, the employing establishment noted that appellant did not raise the issue of a possible mental condition and the medical record did not contain any references other than a brief mention in one of Dr. Hick's April 2005 treatment notes.

By decision dated January 16, 2007, the Office hearing representative affirmed the May 23, 2006 decision.

LEGAL PRECEDENT

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits.[3] This includes cases in which the Office terminates compensation under section 8106(c)(2) of the Federal Employees' Compensation Act for refusal to accept suitable work.

Section 8106(c)(2)[4] of the Act provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to compensation. Section 10.517(a)[5] of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured for him or her has the burden to show that this refusal or failure to work was reasonable or justified. After providing the two notices described in section 10.516,[6] the Office will terminate the employee's entitlement to further compensation under 5 U.S.C. §§ 8105, 8106 and 8107, as provided by 5 U.S.C. § 8106(c)(2). However, the employee remains entitled to medical benefits as provided by 5 U.S.C. § 8103 or justified. To justify termination, the Office must show that the work offered was suitable[7] and must inform appellant of the consequences of refusal to accept such employment.[8] According to Office procedures, certain explanations for refusing an offer of suitable work are considered acceptable.[9] Unacceptable reasons include appellant's

[3] *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

[4] 5 U.S.C. § 8106(c)(2).

[5] 20 C.F.R. § 10.517(a).

[6] *Id*. at § 10.516.

[7] *See Carl W. Putzier*, 37 ECAB 691 (1986); *Herbert R. Oldham*, 35 ECAB 339 (1983).

[8] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(d)(1) (July 1996).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(1)-(5) (July 1996).

preference for the area in which he resides; personal dislike of the position offered or the work hours scheduled; lack of promotional potential or job security.[10]

ANALYSIS

In this case, the Office properly found that Dr. Hicks disagreed with an Office referral physician, Dr. Race, as to whether appellant was totally disabled due to his accepted condition. The Office properly found a conflict in medical evidence which required a referral to an impartial medical specialist for resolution. The Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

The Office referred appellant to Dr. Arredondo for an impartial medical evaluation to resolve the conflict in opinion. Dr. Arredondo performed a thorough evaluation of appellant, which included his preexisting conditions as well as his subsequent bladder control issues and depression. He provided a reasoned opinion that appellant was capable of working eight hours a day, in a limited capacity. Dr. Arredondo provided restrictions, for sedentary duty, which included that appellant could push and pull no more than 50 pounds and lift no more than 20 pounds. He opined that "there is an explanation as to why [appellant] is still in chronic pain." The Board notes that Dr. Arredondo advised that there was "no objective evidence of any serious injury to his dorsal and lumbar spine, from a second injury as he described it." Furthermore, Dr. Arredondo indicated that he did not "see that he has any good reason to be restricted."

When a case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical opinion, the opinion of such specialist, if sufficiently well rationalized and based on a proper background, must be given special weight.[11] Dr. Arredondo's opinion is sufficiently well rationalized and based on a proper factual background such that it represents the weight of the medical evidence on the issue of appellant's ability to work and establishes that he was capable of working eight hours per day in a sedentary position.

Subsequent to the evaluation by Dr. Arredondo, the employing establishment offered appellant a sedentary position. The position accommodated the work restrictions given by Dr. Arredondo. The Office reviewed the position and found it to be suitable for appellant.

To properly terminate compensation under section 8106(c), the Office must provide appellant notice of its finding that an offered position is suitable and give him an opportunity to accept or provide reasons for declining the position.[12] The Office properly followed its procedural requirements in this case. By letter dated April 3, 2006, the Office advised appellant that the position was suitable and provided him 30 days to accept the position or provide reasons for his refusal. The Office further notified appellant that the position remained open, that he

[10] *Arthur C. Reck*, 47 ECAB 339 (1996); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(c) (July 1996).

[11] *Kathryn Haggerty*, 45 ECAB 383, 389 (1994); *Jane B. Roanhaus*, 42 ECAB 288 (1990).

[12] *See Maggie L. Moore*, *supra* note 8.

would be paid for any difference in pay between the offered position and his date-of-injury job, that he could still accept without penalty and that a partially disabled employee who refused suitable work was not entitled to compensation.

On March 31, 2006 appellant refused the position because he had accepted disability retirement and noted that his doctor did not release him to work.

By letter dated May 4, 2006, the Office properly informed appellant that his reasons for refusing the offered position were unacceptable and provided him 15 days to accept the position. Appellant refused to do so and thus the Office properly terminated his wage-loss compensation for refusal of suitable work. At the time of the termination, the weight of the medical evidence established that appellant could perform the duties of the offered position.

Appellant's representative subsequently alleged that the impartial medical examiner did not consider appellant's preexisting and subsequently acquired conditions. The Board notes that the Office must consider preexisting and subsequently acquired conditions in determining the suitability of an offered position.[13] However, as noted, Dr. Arredondo considered appellant's preexisting and his subsequently acquired conditions. Furthermore, these were not the reasons, for which appellant alleged that he was unable to accept the offered position. The Board noted that appellant did not submit sufficient medical evidence to establish that any other medical conditions prevented him from performing the sedentary position

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.[14] In the present case, appellant has not shown that his refusal to work was justified. The weight of the medical evidence continues to support that appellant's accepted conditions did not prevent him from performing the job he was offered on March 23, 2006. The medical reports received subsequent to the evaluation by Dr. Arredondo, are insufficient to either overcome his opinion or create a new conflict in the medical evidence.

Dr. Hicks submitted additional treatment notes, however, he merely repeated his previous opinion that appellant was unable to work. His opinion was part of the conflict in medical opinion for which appellant was referred to Dr. Arredondo.[15] Dr. Hicks did not provide any opinion with respect to appellant's ability to perform the offered position. Dr. Arredondo did not provide any findings and rationale to support that appellant would have been unable to perform the limited-duty position during the time period it was offered and available to him.[16] Other

[13] *See Gayle Harris*, 52 ECAB 319 (2001).

[14] *See M.S.*, 58 ECAB ___ (Docket No. 06-797, issued January 31, 2007).

[15] Submitting a report from a physician who was on one side of a medical conflict that an impartial specialist resolved is, generally, insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict. *Jaja K. Asaramo*, 55 ECAB 200 (2004).

[16] In order to establish causal relationship, a physician's report must present rationalized medical opinion evidence, based on a complete factual and medical background; *see Kathryn Haggerty*, 45 ECAB 383 (1994). Rationalized medical evidence is evidence which relates a work incident or factors of employment to appellant's condition, with stated reasons of a physician; *see Gary L. Fowler*, 45 ECAB 365 (1994).

medical reports submitted by appellant did not provide a specific opinion regarding appellant's ability to perform the offered position.

Following the termination of his benefits, appellant has not established that the offered position was outside of his physical recommendations. The Board finds that appellant did not meet his burden of proof to show that his refusal to accept suitable work was justified.

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits effective June 3, 2006 and that appellant did not, thereafter, establish that his refusal of suitable work was justified.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation effective June 3, 2006 on the grounds that he refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the January 16, 2007 decision of the Office of Workers' Compensation Programs' hearing representative is affirmed.

Issued: February 15, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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