United States Department of Labor
Employees' Compensation Appeals Board

R.J., Appellant	)	
and	)	**Docket No. 08-1996**
	)	**Issued: April 10, 2009**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Milwaukee, WI, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

On July 14, 2008 appellant filed a timely appeal from a September 19, 2007 merit decision of the Office of Workers' Compensation Programs affirming the termination of his compensation for refusing suitable work and a June 3, 2008 nonmerit decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the June 3, 2008 nonmerit decision.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's entitlement to compensation effective May 14, 2005 on the grounds that he refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c); and (2) whether the Office properly denied his request for further review of the merits of his claim under 5 U.S.C. § 8128.

FACTUAL HISTORY

On September 6, 2002 appellant, then a 41-year-old laundry worker, filed a claim for an injury to his lower back on August 27, 2002 when he "bent down to put a stack of bath towels in a blue cart." He stopped work on August 27, 2002. The Office accepted the claim for left side sciatica and paid appellant compensation for total disability beginning October 21, 2002.

On February 27, 2003 the Office referred appellant to Dr. Vijay V. Kulkarni, a Board-certified orthopedic surgeon, for a second opinion evaluation. On March 18, 2003 Dr. Kulkarni diagnosed an aggravation of a preexisting lumbar spine injury with disc bulging at L3-4 causally related to the August 27, 2002 work injury. He found that appellant could perform sedentary work. Appellant's attending physician, Dr. Richard Haas, a Board-certified anesthesiologist, found that he remained disabled from employment.

On May 10, 2004 the Office referred appellant to Dr. James B. Stiehl, a Board-certified orthopedic surgeon, to resolve a conflict in medical opinion regarding his work restrictions. In a report dated June 11, 2004, Dr. Stiehl reviewed the evidence of record and listed findings on examination. He found that appellant had "low grade radicular symptoms in his left lower extremity, possibly involving the L4 and L5 nerve roots" and that he was "fairly debilitated at this time with chronic mechanical lower back pain." Dr. Stiehl noted that he had no objective neurological findings and did not require surgery. He related that appellant described neck and shoulder problems but found that these occurred after the August 27, 2002 work injury. Dr. Stiehl found that his subjective complaints outweighed the objective findings.

Regarding appellant's work abilities, Dr. Stiehl stated:

> "[Appellant] could only do sedentary work at this time, but I would recommend he be given the ability to alternate sitting and standing, even if briefly, every 20 to 30 minutes. It is possible that with some additional functional rehabilitation, he would be able to stand, sit, walk in an unrestricted fashion and he would be able to lift repetitively up to 20 pounds, but I do not think he would be able to do more than this just based on the two-level spine fusion done in the past."

Dr. Stiehl concluded that appellant "could do sedentary work at present, but only if he were able to alternate standing and sitting every 20 to 30 minutes." He did not complete the attached work restriction evaluation.

On December 15, 2004 the employing establishment offered appellant the position of modified laundry worker and stated, "This is a primarily sedentary position that appears to meet your restrictions as listed above…." The employing establishment described the position as requiring "[s]edentary work with alternate sitting and standing every 20 to 30 minutes. Some walking is required and lifting as a 10-pound maximum, with occasional 10-pound lifting/carrying required to place linen on a cart."

On February 15, 2005 the Office informed appellant of its determination that the offered position was suitable and provided him 30 days to accept the position or provide a written explanation of his refusal. It notified him that, if he refused to accept a suitable position without justification, his compensation would be terminated.

On February 15, 2005 the Office noted that appellant was claiming a consequential injury to his shoulders and neck and requested that he submit further factual and medical information.

On February 24, 2005 appellant declined the position, asserting that he was unable to work. He submitted January 11, February 8 and March 8, 2005 notes from Dr. Haas indicating

that he could not work due to low back, neck and shoulder pain. On February 8, 2005 Dr. Haas diagnosed cervical disc degeneration and facet disease.

In a report dated March 7, 2005, Dr. Haas related that he treated appellant beginning in January 2003 for failed low back syndrome. While undergoing treatment, appellant complained of pain in his shoulder and neck. Dr. Haas related that an MRI scan study of the cervical spine showed "multilevel, degenerative disc disease, more prominent at C4 through C7, with C5-C6 the worst with regard to cervical canal stenosis." He stated, "My opinion is that [appellant] suffers from chronic pain syndrome, which originated in his low back and left leg, and which exacerbated his neck and shoulder pain."

By letter dated March 31, 2005, the Office informed appellant that his reasons for refusing the position were not acceptable and provided him 15 days to accept the position or have his compensation terminated.

In a treatment note dated April 5, 2005, Dr. Haas opined that appellant was unable to work due to severe shoulder and low back pain.

By decision dated April 28, 2005, the Office terminated appellant's compensation after finding that he refused an offer of suitable work. It noted that the employing establishment verified on March 31, 2005 that the position remained available.

On May 5, 2005 appellant requested an oral hearing. A hearing was held on September 12, 2006. Appellant related that he was unable to perform the modified job offer because his shoulders would stiffen and ache after folding clothes. The hearing representative recommended that he file an occupational disease claim if he believed that his shoulder and neck condition were related to his work duties. She informed appellant and his representative that conditions which either predated employment or were causally related to work were considered in determining if a position was suitable. The hearing representative recommended that he file an occupational disease claim if he believed that his neck or shoulder condition prevented him from performing the duties of the offered position.

By decision dated November 22, 2006, the Office hearing representative affirmed the April 28, 2005 termination of appellant's compensation for refusing suitable work. She noted that the evidence currently of record did not show that his neck or shoulder condition was causally related to the August 27, 2002 work injury.

In a report dated December 21, 2006, Dr. Haas related that he had treated appellant beginning in January 2003 for back, leg and knee pain. He noted his history of "a laminectomy in 1994, a spinal fusion in 1999 and a cervical fusion in June 2006." Dr. Haas indicated that he did not have an opinion on whether work contributed to his symptoms. In a report dated January 29, 2007, Dr. Mary Louise Bell, a psychologist, diagnosed a pain disorder due to psychological and medical factors.

On June 11, 2007 appellant requested reconsideration. He submitted a December 21, 2006 letter from the Office showing that it had accepted his claim for a sprain of the shoulder and upper arm and the left rotator cuff under file number xxxxxx089. Appellant argued that this

established that his neck and shoulder condition were due to his employment. In a decision dated June 25, 2007, the Office denied merit review of its November 22, 2006 decision.

On May 5, 2008 appellant again requested reconsideration. He submitted a motion to dismiss his appeal to the Merit Systems Protection Board from the Office of Personnel Management on the grounds that it had accepted that he was entitled to disability retirement.

By decision dated June 3, 2008, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant further review of the merits of the case under section 8128.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[1] Section 8106(c)(2) of the Federal Employees' Compensation Act[2] 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.[3] To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[4] Section 8106(c) will be narrowly construed as it serves as a penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[5]

Section 10.517(a) of the Act's implementing regulations provide 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]

Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, establishing that a position has been offered within the employee's work restrictions and setting for the specific job requirements of the position.[8] In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision,

[1] *Linda D. Guerrero*, 54 ECAB 556 (2003).

[2] 5 U.S.C. §§ 8101-8193.

[3] 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

[4] *Ronald M. Jones*, 52 ECAB 190 (2000).

[5] *Joan F. Burke*, 54 ECAB 406 (2003).

[6] 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 4.

[7] 20 C.F.R. § 10.516.

[8] *See Linda Hilton*, 52 ECAB 476 (2001).

the Office has the burden of showing that the work offered to and refused by appellant was suitable.[9]

Once the Office establishes that the work offered is suitable, the burden shifts to the employee who refuses to work to show that the refusal or failure to work was reasonable or justified.[10] The determination of whether an employee is physically capable of performing a modified assignment is a medical question that must be resolved by medical evidence.[11] Office procedures state that acceptable reasons for refusing an offered position include medical evidence of inability to do the work.[12]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained sciatica on the left side due to factors of his federal employment and paid him compensation for total disability beginning October 21, 2002. It determined that a conflict in medical opinion existed between Dr. Kulkarni, an Office referral physician and Dr. Haas, appellant's attending physician, regarding the extent of his disability from employment. On May 10, 2004 the Office referred him to Dr. Stiehl, a Board-certified orthopedic surgeon, for an impartial medical examination. Based on the opinion of Dr. Stiehl, it determined that appellant had the physical ability to perform the position offered by the employing establishment of laundry worker.

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[13] On June 11, 2004 Dr. Stiehl diagnosed radicular symptoms in the lower extremities possibly in the L4 and L5 nerve roots and chronic mechanical low back pain. He noted that appellant described neck and shoulder problems which occurred subsequent to his accepted work injury. Dr. Stiehl found that appellant could perform sedentary work with alternating sitting and standing every 20 to 30 minutes. He further found that appellant possibly could, with more rehabilitation, "stand, sit, [and] walk in an unrestricted fashion" and lift up to 20 pounds repetitively. It thus appears that Dr. Stiehl placed some restrictions on appellant's ability to walk; however, the extent of these limitations are not apparent from his report. Dr. Stiehl did not complete the work restriction evaluation as requested by the Office and did not review the position of modified laundry worker. He further did not specifically respond to the Office's question regarding whether appellant had the capacity to work full time or part time. The employing establishment's job offer indicated that "some walking" was involved but did not specify the amount of walking or the duration. The

[9] *Id*.

[10] 20 C.F.R. § 10.517(a).

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

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(3) (July 1997).

[13] *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

employing establishment further indicated that the position was "primarily sedentary" without further explanation. As it is unclear from Dr. Stiehl's report whether appellant had the capacity to perform the duties of laundry worker, the Office improperly determined that the position was suitable.[14]

CONCLUSION

The Board finds that the Office improperly terminated appellant's entitlement to compensation effective May 14, 2005 on the grounds that he refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 3, 2008 and September 19, 2007 are reversed.

Issued: April 10, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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

[14] Further, the record indicates that appellant claimed a consequential injury to his shoulders and neck. On February 8, 2005 Dr. Haas diagnosed cervical disc degeneration and facet disease. In a report dated December 21, 2006, he noted that appellant underwent a cervical fusion in June 2006. At the September 12, 2006 hearing, the hearing representative informed appellant and his attorney that preexisting conditions causally related to the work injury were considered in determining whether a position was suitable. The Office, however, must consider preexisting and subsequently acquired conditions in evaluating the suitability of an offered position. *Gayle Harris*, 52 ECAB 319 (2001).