United States Department of Labor
Employees' Compensation Appeals Board

F.F., Appellant	)	
and	)	**Docket No. 09-668**
	)	**Issued: December 22, 2009**
U.S. POSTAL SERVICE, GENERAL MAIL FACILITY, Harrisburg, PA, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 8, 2009 appellant filed an appeal of a December 9, 2008 decision of the Office of Workers' Compensation Programs that terminated his wage-loss 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 benefits effective December 21, 2008 pursuant to 5 U.S.C. § 8106(a).

FACTUAL HISTORY

On November 2, 1992 appellant, then a 35-year-old clerk, sustained injuries to his cervical spine, right forearm and right knee when he was hit by a jitney and thrown in the air.[1]

[1] The initial accepted injuries were cervical strain, herniated disc at C5-6, contusion of the right forearm and internal derangement of the right knee. Appellant receives a 40 percent disability from the Department of Veterans Affairs for a right wrist fusion.

He stopped work that day and was placed on the periodic rolls. On October 25, 1994 appellant underwent a cervical fusion procedure and returned to light duty for four hours a day on April 26, 1995. On May 10, 1995 he began full-time light duty and missed work intermittently until November 2, 1995 when he again became totally disabled. Appellant returned to four hours of light duty daily on February 12, 1996 and on April 4, 1996 underwent right knee arthroscopic surgery. On July 8, 1996 he returned to four hours of light duty and on July 22, 1996 to full-time light duty. On September 30, 1996 appellant was placed in a permanent modified position.

On May 30, 1997 appellant was granted a schedule award for a 27 percent permanent impairment of the left leg. He had additional cervical surgery on April 17, 1998 and again stopped work, returning to modified duty for four hours daily on September 8, 1998, working intermittently thereafter until April 19, 1999. Appellant was returned to the periodic rolls and on May 1, 2000 returned to work.

By decision dated August 21, 2000, the Office determined that appellant's actual earnings fairly and reasonably represented his wage-earning capacity and reduced his compensation to zero. On April 16, 2001 appellant was granted a schedule award for a 13 percent permanent impairment of the left upper extremity. He missed intermittent periods of work in December 2001 and, by decision dated April 23, 2002, the Office denied his claim for an additional schedule award. Appellant filed an appeal with the Board on June 3, 2002, and on July 22, 2002, the Board dismissed the appeal at his request.[2] He stopped work on April 22, 2003 and filed a recurrence claim which was accepted. Dr. Mark P. Holencik, an osteopath, advised that appellant was totally disabled and could never return to regular duty. He continued to advise that appellant was totally disabled.

The Office continued to develop the claim and on March 19, 2007 referred appellant to Dr. Nicholas G. Sotereanos, a Board-certified orthopedic surgeon, for a second opinion evaluation. In an April 20, 2007 report, Dr. Sotereanos noted his review of the record and appellant's complaints. He provided examination findings and diagnosed chronic cervical spine pain and Grade 2 right knee instability caused by the December 1, 1992 employment injury. Dr. Sotereanos advised that maximum medical improvement had been reached and that appellant could perform light duty with restrictions to his physical activity including a 20-pound weight restriction. The Office then referred appellant to Dr. Mohammad Aslam, a Board-certified neurologist, for a second opinion neurological evaluation. In a June 29, 2007 report, Dr. Aslam noted the history of injury, his review of medical records and appellant's complaints of headache, neck pain and weakness in the left upper extremity. He provided physical examination findings including limited range of motion of the cervical spine with some paravertebral muscle spasm. Dr. Aslam diagnosed chronic cervicalgia, status post cervical fusion at C5-6 and C6-7 levels, post-traumatic headaches and knee problems, all due to the employment injury and recommended treatment by a neurologist. He concluded that appellant could perform part-time work and in an attached work capacity evaluation, Dr. Aslam advised that appellant could work eight hours daily with half-hour breaks every four hours.

[2] By decision dated July 15, 2002, the Office denied modification of the April 23, 2002 decision. An Office decision, issued while the Board has jurisdiction over the matter in dispute, is null and void. *Lawrence Sherman*, 55 ECAB 359 (2004).

On July 10, 2007 the Office accepted appellant's headache condition as employment related and determined that a conflict had been created regarding whether he could work four hours a day or was totally disabled. Appellant was referred to Dr. David C. Baker, Board-certified in orthopedic surgery, for an impartial evaluation. In a November 10, 2007 report, Dr. Baker noted his review of the medical record, the history of injury and appellant's complaints of headache and left upper extremity pain. Physical examination findings included limited neck range of motion, no neurological deficits in either upper extremity and negative Phalen's and Tinel's tests. Dr. Baker diagnosed status post cervical spine fusion with left and right arm pain, anterior cruciate ligament insufficiency of the right knee and headaches, possibly related to the cervical spine and advised that appellant had drug addiction, chronic obstructive pulmonary disease and a right wrist fusion performed in the distant past. He recommended a 3D computerized tomography (CT) of the cervical spine and advised that appellant could work a sedentary job for at least 4 hours a day with restrictions of 2 hours walking; 6 hours standing; 1 hour reaching; reaching above the shoulder for 1/2 hour every 4 hours; no right knee twisting; and pushing, pulling and lifting limited to 4 hours with a 20-pound weight restriction.

In December 2007, appellant was referred for vocational rehabilitation. On December 21, 2007 the employing establishment offered him a modified mail processing clerk position for 4 hours daily, with physical restrictions of 4 hours sitting, 3 hours fine manipulation/typing; no squatting or kneeling; pushing, pulling and lifting of up to 10 pounds for 4 hours; 2 hours walking; 6 hours standing; 1 hour reaching; and less than 30 minutes reaching above the shoulder. On January 3, 2008 Dr. Baker advised that appellant could work an eight-hour day with intermittent overhead use of each arm to total one-half hour out of every four hours. In May 2008, the employing establishment reoffered the position and on May 5, 2008 appellant declined the offer, stating that he could not work due to his headaches.

By report dated May 16, 2008, Dr. Steven E. Morganstein, a Board-certified osteopath specializing in physical medicine and rehabilitation, noted appellant's complaints of restricted neck and bilateral shoulder motion and daily headaches. Physical examination demonstrated restricted cervical spine range of motion with paraspinal tenderness, limited active flexion and abduction of both shoulders with positive impingement testing on the right and decreased sensation along the forearm into the fingers of both hands, decreased grip strength bilaterally and diminished deep tendon reflexes at the triceps and brachioradialis bilaterally. Dr. Morganstein diagnosed chronic neck pain with chronic left cervical radiculitis, chronic cervicogenic headaches and history of multiple surgeries and concluded that appellant was permanently disabled. On June 2, 2008 Dr. Baker reiterated that appellant could work eight hours daily with the above restrictions.

On August 14, 2008 the employing establishment offered appellant a full-time modified position with 8 hours of sitting; 2 of walking; 6 of standing; 1 hour of intermittent reaching; 1/2 hour of intermittent overhead reaching every 4 hours; pushing, pulling and lifting up to 20 pounds for 4 hours daily; and no squatting, kneeling or climbing. By letter dated August 28, 2008, the Office advised appellant that the position offered was suitable. He was notified that if he failed to report to work at the offered position or failed to demonstrate that the failure was justified, pursuant to section 8106 of the Federal Employees' Compensation Act,[3] his right to

[3] 5 U.S.C. §§ 8101-8193.

compensation would be terminated and was given 30 days to respond. On September 26, 2008 appellant refused the offered position, stating that he had attempted suicide, was hospitalized and was under the care of a mental health professional. The Office ascertained that the position was still available and on October 1, 2008 informed appellant that the reasons for refusing the offered position were unacceptable and gave him an additional 15 days to respond. In an October 12, 2008 letter, appellant stated that he was totally disabled, mostly because of headaches but also due to his neck, loss of use of his arms and his right knee. He explained that he was having emotional problems due to his pain and had nodules in his lungs. A July 18, 2008 CT of the chest demonstrated small nodular densities in both lungs with calcified pleural plaque formation in the right lung apex, most suggestive of prior asbestos exposure.[4]

On December 4, 2008 the Office ascertained that the modified position was still available and, by decision dated December 9, 2008, it terminated appellant's wage-loss compensation, effective December 21, 2008, on the grounds that he refused an offer of suitable work. The decision was remailed to a new address on December 11, 2008.

LEGAL PRECEDENT

Section 8106(c) of the 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."[5] It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[6] The implementing regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.[7] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[8] In determining what constitutes "suitable work" for a particular disabled employee, the Office considers 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.[9] Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical

[4] Appellant also submitted a number of unidentified and unsigned treatment notes dated from May 28, 2003 to July 14, 2008 that reported his complaints, provided findings on physical examination and diagnoses and listed his medications.

[5] 5 U.S.C. § 8106(c).

[6] *Joyce M. Doll*, 53 ECAB 790 (2002).

[7] 20 C.F.R. § 10.517(a).

[8] *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[9] 20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB 681 (2004).

evidence of inability to do the work or travel to the job.[10] 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.[11]

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.[12] It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.[13]

Section 8123(a) of the Act provides that if there is 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.[14] When 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 on a proper factual background, must be given special weight.[15]

ANALYSIS

The Office accepted that appellant sustained a cervical strain, herniated disc at C5-6, cervical disc degeneration, contusion of the right elbow and forearm, internal derangement of the right knee and headache caused by a November 11, 1992 employment injury. Appellant worked modified part-time duty until April 22, 2003 and received wage-loss compensation until December 21, 2008 when the Office terminated his compensation for refusing suitable work.

The Board finds that the Office improperly terminated appellant's wage-loss compensation as the medical evidence failed to establish that he was capable of performing the position offered by the employing establishment. In determining that the full-time modified clerk position was suitable, the Office relied on the opinion of Dr. Baker, a Board-certified orthopedic surgeon who performed an impartial evaluation for the Office. While Dr. Baker's opinion was sufficient to establish that appellant could perform the modified position based on his orthopedic conditions, appellant's headaches had also been accepted as employment related. The Office had developed this aspect of the claim by referring appellant to Dr. Aslam, a Board-certified neurologist, who provided a June 29, 2007 report in which he diagnosed employment-related chronic cervicalgia and post-traumatic and recommended treatment by a neurologist. In the body of his report, Dr. Aslam advised that appellant could perform part-time work. However, in an attached work capacity evaluation, he advised that appellant could work

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment*: *Determining Wage-Earning Capacity*, Chapter 2.814.5.a(1) (July 1997); *see Lorraine C. Hall*, 51 ECAB 477 (2000).

[11] *Gloria G. Godfrey*, 52 ECAB 486 (2001).

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

[13] *Richard P. Cortes*, 56 ECAB 200 (2004).

[14] 5 U.S.C. § 8123(a); *see Geraldine Foster*, 54 ECAB 435 (2003).

[15] *Manuel Gill*, 52 ECAB 282 (2001).

eight hours daily with half hour breaks every four hours. Thus, his opinion was contradictory as to the number of hours appellant could work. Medical opinions that are speculative or equivocal in character are of diminished probative value[16] and proceedings under the Act are not adversarial in nature and the Office is not a disinterested arbiter. While the appellant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. Once the Office has begun an investigation of a claim, it must pursue the evidence as far as reasonably possible. It has an obligation to see that justice is done.[17] The Office should therefore have requested a supplementary report from Dr. Aslam regarding appellant's work capabilities.

The Board further notes that the medical evidence most contemporaneous with the December 21, 2008 termination is a May 16, 2008 report from Dr. Morganstein who concluded that appellant was permanently disabled. Furthermore, when appellant rejected the offered position on September 26, 2008, he stated that he had attempted suicide, had been hospitalized and was under the care of a mental health professional and in an October 12, 2008 letter, stated that he was totally disabled, mostly due to his headaches, but also because of his neck condition, loss of use of his arms and his right knee condition. He further explained that he was having emotional problems and had nodules on his lungs. A July 18, 2008 lung chest CT was suggestive of asbestos exposure.

It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.[18] At the time it terminated appellant's wage-loss compensation on December 21, 2008, in a report dated six months after Dr. Baker's evaluation, Dr. Morganstein advised that appellant was totally disabled. The Office had not fully developed his headache condition. There was CT evidence that he had lung densities and, although he submitted to supportive medical evidence, he alleged that he had attempted suicide and was under the care of mental health professional. As a penalty provision, section 8106(c)(2) must be narrowly construed.[19] The Board therefore finds that for the foregoing reasons, the evidence does not establish the suitability of the offered position and the Office did not discharge its burden of proof to justify the termination of appellant's compensation pursuant to section 8106(c)(2) of the Act.[20]

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits on the grounds that he refused an offer of suitable work.

[16] *D.D.*, 57 ECAB 734 (2006).

[17] *A.A.*, 59 ECAB ____ (Docket No. 08-951, issued September 22, 2008).

[18] *Richard P. Cortes, supra* note 13.

[19] *J.F.*, 60 ECAB ____ (Docket No. 08-439, issued October 24, 2008).

[20] 5 U.S.C. § 8106(c)(2); *see R.B.*, 60 ECAB ____ (Docket No. 08-2154, issued May 8, 2009).

ORDER

IT IS HEREBY ORDERED THAT the December 9, 2008 decision of the Office of Workers' Compensation Programs be reversed.

Issued: December 22, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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