

pallet.¹ He stopped work March 1, 2002 and did not return. The Office accepted the claim for a lumbar strain and paid appropriate compensation. He was placed on the periodic rolls on November 12, 2002.

Beginning on April 10, 2002, appellant was followed by Dr. Harvey Orlin, an attending Board-certified orthopedic surgeon.² In reports through June 24, 2002, Dr. Orlin noted a history of injury and related appellant's symptoms of lumbar pain, left-sided lumbar radiculopathy and difficulty standing. On examination, Dr. Orlin found a positive straight leg raising test on the left and marked tenderness in the lumbar paraspinals and sciatic notch. He described worsening neurologic signs, including difficulty walking, a minimally ataxic gait, hyperreflexia in the upper and lower extremities, bilateral ankle clonus and upper extremity tremors. He obtained studies showing degenerative disc disease at L1-2 and L4-5 and L5-S1 without focal herniation.³ Dr. Orlin diagnosed a lumbar spine sprain with left-sided lumbar radiculopathy as well as signs of neurologic disease requiring a neurologic consultation. He noted worsening neurologic signs in periodic reports through May 19, 2003, finding appellant totally disabled for work.

In a June 21, 2002 report, Dr. Dwight C. Blum, a Board-certified orthopedic surgeon, performed a fitness-for-duty examination for the employing establishment. He observed an antalgic gait and severely restricted lumbar motion and diagnosed a lumbosacral strain with possible left radiculopathy related to the March 1, 2002 lifting incident. He found appellant fit for sedentary work.

In a June 27, 2002 report, Dr. Joseph S. Jeret, an attending Board-certified neurologist and psychiatrist specializing in clinical neurophysiology, noted a history of injury and treatment. He related appellant's symptoms of low back pain with radiation into the right lower extremity. On examination, Dr. Jeret found impaired judgment and insight, slightly increased tone and hyperreflexia in both lower extremities, bilateral ankle clonus and an unsteady wide-based gait. In a March 12, 2003 report, Dr. Jeret diagnosed primary lateral sclerosis based on abnormalities observed on electromyography (EMG) and nerve conduction velocity (NCV) testing of the upper and lower extremities. Dr. Jeret stated that, while appellant could return to work, his supervisor

¹ From March 4 to 19, 2002, appellant was treated by Dr. Paul A. Cooperman, a physician under contract to the employing establishment. On examination, Dr. Cooperman noted lumbosacral tenderness and diagnosed a lumbosacral spine sprain or strain caused by the March 1, 2002 lifting incident. He released appellant to sedentary duty as of March 19, 2002.

² In a May 3, 2002 report, Dr. Harold Avella, a Board-certified orthopedic surgeon associated with Dr. Orlin, noted dysarthric speech and gait abnormalities possibly indicative of cerebral palsy. In a June 28, 2002 follow-up report, Dr. Avella noted that appellant's low back pain and radicular symptoms continued essentially unchanged and recommended a neurologic consultation for a possible central nervous system process.

³ An April 22, 2002 lumbar magnetic resonance imaging (MRI) scan showed degenerative disc disease at L1-2, L4-S1. A September 10, 2002 cervical MRI showed significant degenerative disc disease from C2-C6 with neuroforaminal encroachment. A January 7, 2003 thoracic MRI showed minimal degenerative disc disease at T6-T8.

should be informed that he was at risk for falling. Dr. Jeret requested that the Office authorize a neuromuscular consultation.⁴

On June 25, 2003 Dr. Orlin noted persistent lumbar pain and weakness with radiation to both lower extremities, with superimposed weakness in all extremities due to primary lateral sclerosis. Dr. Orlin found appellant permanently disabled for his custodial job due to cervical and lumbar disc disease, attributable to the March 1, 2002 lifting incident.⁵

To determine the nature and extent of any continuing work-related disability, the Office referred appellant, a statement of accepted facts and the medical record to Dr. William Buschmann, a Board-certified orthopedic surgeon, for a second opinion examination. In a July 28, 2003 report, Dr. Buschmann found appellant able to heel and toe walk and squat without difficulty and observed hyperreflexia of the upper extremities. He diagnosed a lumbar sprain. In an August 14, 2003 addendum report, Dr. Buschmann opined that appellant's back problems were directly caused by the March 1, 2002 injury and that he was capable of full-time, sedentary work.

The Office found a conflict of medical opinion between Dr. Orlin, for appellant, and Dr. Buschmann, for the Office. To resolve this conflict, the Office referred appellant, the medical record and a statement of accepted facts to Dr. Edmund C. Stewart, a Board-certified orthopedic surgeon, for an impartial medical evaluation. In an October 27, 2003 report, Dr. Stewart provided a history of injury and treatment. On examination, he found limited lumbar motion, positive straight leg raising tests bilaterally at 60 degrees, hyperreflexia throughout the lower extremities and bilateral ankle clonus. Appellant was unable to toe or heel walk. Dr. Stewart diagnosed status post lumbosacral sprain and a work-related permanent aggravation of primary lateral sclerosis. He stated that appellant's lumbar signs and symptoms continued to be related to the accepted injury. Dr. Stewart explained that as appellant's "work capabilities ... may well be adversely affected by his neurological disorder ... clearance for work [should] be given by his neurologist." Dr. Stewart also "strongly advise[d] an independent neurological evaluation." He characterized appellant as being permanently and markedly disabled. He also recommended that the effects of appellant's hepatitis C on his ability to work be evaluated by an internist, as he appeared undernourished.⁶ In an attached work capacity evaluation (Form OWCP-5c), Dr. Stewart found appellant able to work for 4 hours a day with no twisting, bending, kneeling or climbing, no lifting, pulling or pushing over 10 pounds, no operating a motor vehicle. He limited sitting to two hours and standing and walking to one hour. He also prescribed 10-minute breaks every 2 hours. Dr. Stewart again recommended a neurologic examination to determine appellant's work capabilities.

⁴ The record contains an April 28, 2003 schedule award evaluation regarding a February 10, 2000 left shoulder injury. The left shoulder injury claim and the schedule award issue related to that claim are not before the Board on the present appeal.

⁵ Dr. Orlin submitted periodic reports through August 2003 finding appellant totally disabled for work due to cervical and lumbar sprains, lumbar radiculopathy and extensive degenerative disc disease.

⁶ Appellant submitted chart notes dated from November 2000 to June 2001 from physicians at the Department of Veterans Affairs regarding his treatment for hepatitis C.

In August 21 and November 20, 2003 reports, Dr. Orlin noted that an MRI scan demonstrated a “bulging disc with spondylitic ridges C3-C6.” Dr. Orlin diagnosed residuals of a lumbar strain with bilateral radiculopathy, multilevel degenerative lumbar disc disease, cervical spine sprain with multilevel disc degeneration, and primary lateral sclerosis causing progressive weakness, spasticity and hyperreflexia of the upper and lower extremities. He opined that appellant’s work-related back condition compounded his neurologic disease.

On February 5, 2004 the employing establishment offered appellant a limited-duty position as a custodial laborer, working from 4:00 to 8:00 p.m., Thursday through Monday. Appellant would be assigned to dust, mop and sweep the workroom, offices, bathroom and other areas. Appellant would perform sedentary filing activities from 4:00 to 5:00 p.m., clean the retail area from 5:00 to 6:00 p.m., file from 6:00 to 6:30 p.m., clean from 6:30 to 7:30 p.m., then file until 8:00 p.m. The physical requirements were noted as 2 hours sitting, 1 hour each standing and walking, with lifting and carrying limited to 10 pounds.

In a February 11, 2004 letter, the Office advised appellant that it had “reviewed [the] offer of employment and ... compared it with the medical evidence concerning [his] disability to work, and we have found the offer to be suitable.” The Office advised appellant that he had 30 days from the date of the letter to either accept the job or provide an acceptable explanation for his refusal. The Office also advised appellant that his compensation would be terminated if he refused the job offer or failed to report for work as scheduled without good cause.

Appellant declined the job offer due to his medical condition. He enclosed a February 17, 2004 report from Dr. Orlin, finding him totally disabled for all work, including custodial duties, due to progressive primary lateral sclerosis and lumbar and cervical disc disease.

In a February 26, 2004 report, Dr. Jeret noted that appellant’s neurologic condition had worsened and that his back problems made it difficult to sit or stand for longer than 10 minutes. On examination, Dr. Jeret found increased tone in both lower extremities, abnormal reflexes throughout the upper and lower extremities, bilateral ankle clonus and an equivocal Hoffman’s sign. Dr. Jeret observed that appellant “ambulate[d] with moderate difficulty but independently” due to “proximal weakness and/or spasticity.” Dr. Jeret diagnosed “[n]oncompressive myelopathy, interval worsening.” He found appellant totally disabled.

In a February 26, 2004 form report, Kathleen A. Welch, a vocational rehabilitation counselor assigned to appellant’s case, noted that appellant had received the job offer and had his physician write a letter regarding his total disability. She instructed appellant to “return job offer letter.” In a March 1, 2004 report, Ms. Welch noted meeting with appellant at his home on February 11, 2004. She described him as frail, weak and observed his difficulty walking. Ms. Welch noted that Dr. Stewart “indicate[d] that an Independent Neurological Evaluation may be necessary for a clearance to work.”

In a May 11, 2004 telephone memorandum, the Office noted that the employing establishment confirmed that the “job [was] still available.” The record indicates that appellant did not provide an additional response or report for work as of May 11, 2004.

By decision dated May 12, 2004, the Office terminated appellant's compensation benefits effective May 16, 2004 on the grounds that he refused an offer of suitable work. The Office found that Dr. Stewart represented the weight of the medical evidence as he was an impartial medical specialist, had examined appellant and reviewed the record.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁷ In this case, the Office terminated appellant's compensation under section 8106(c)(2) of the Act, which 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.⁸ 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.⁹ 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.¹⁰

Section 10.517(a) of the Act's implementing regulations provides 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.¹¹ 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.¹²

ANALYSIS

The Office accepted that appellant sustained a lumbar strain on March 1, 2002. The Office terminated appellant's compensation effective May 16, 2004 on the grounds that he refused an offer of suitable work. The initial question in this case is whether the Office properly determined that the position was suitable. 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 the medical evidence.¹³ A review of the record in the present case indicates that there is insufficient medical evidence to support a finding that the offered position is suitable work.

⁷ *Linda D. Guerrero*, 54 ECAB ____ (Docket No. 03-267, issued April 28, 2003); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁸ 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB ____ (Docket No. 02-66, issued February 28, 2003).

⁹ *Ronald M. Jones*, 52 ECAB 190 (2000); *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

¹⁰ *Joan F. Burke*, 54 ECAB ____ (Docket No. 01-39, issued February 14, 2003); *see Robert Dickerson*, 46 ECAB 1002 (1995).

¹¹ 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 9.

¹² 20 C.F.R. § 10.516.

¹³ *See Gayle Harris*, 52 ECAB 319, 321 (2001); *Maurissa Mack*, 50 ECAB 498 (1999).

Appellant submitted reports from Dr. Orlin, an attending Board-certified orthopedic surgeon, who found him totally disabled for work due to the combined effects of the accepted lumbar injury and primary lateral sclerosis. Appellant also submitted reports from Dr. Jeret, a Board-certified neurologist and psychiatrist, who diagnosed primary lateral sclerosis causing weakness and neurologic abnormalities in all extremities. To determine the nature and extent of appellant's disability, the Office obtained a second opinion from Dr. Buschmann, a Board-certified orthopedic surgeon, who found appellant capable of full-time sedentary work. The Office found a conflict of medical opinion between Dr. Orlin, for appellant, and Dr. Buschmann, for the Office, on the nature and extent of appellant's work limitations. To resolve this conflict, the Office referred appellant to Dr. Stewart, a Board-certified orthopedic surgeon, for an impartial medical opinion.¹⁴

Dr. Stewart's opinion, however, does not fully resolve the conflict of opinion regarding appellant's ability to work. In an October 27, 2003 report, Dr. Stewart found objective evidence of both lumbar injury and a degenerative neurologic process. He diagnosed status post lumbar strain and primary lateral sclerosis, by history. Although he found appellant able to perform limited duty for four hours a day, Dr. Stewart noted that as appellant's "work capabilities ... may well be adversely affected by his neurological disorder ... clearance for work be given by his neurologist. Dr. Stewart also recommended that the Office refer appellant for an independent medical examination by a neurologist.¹⁵ He explained that there was significant pathophysiologic interplay between the accepted lumbar sprain and the neurologic disease, stating that the lumbar injury permanently aggravated the primary lateral sclerosis. The Board notes that it is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.¹⁶ Dr. Stewart repeated his recommendation for a neurologic referral in a work capacity evaluation form. The Board finds that the report of Dr. Stewart was insufficient to establish that appellant was capable of performing the offered limited duty. He explained that a neurologist's opinion was necessary to resolve the question of whether appellant was able to work.

The Board finds that the Office has not established appellant's capacity to perform the duties of the custodial position in light of his lateral sclerosis condition. Although Dr. Stewart indicated work restrictions due to the accepted orthopedic condition of lumbar strain, he cautioned that there was a significant interplay with appellant's neurologic condition and that a further work clearance by a neurologist should be obtained. The September 23, 2003 letter of referral to Dr. Stewart as the impartial medical specialist noted that he could obtain consultation

¹⁴ Section 8123(a) of the Act provides, in pertinent part: "If there is a disagreement between the physician making the examination of the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a). For the application of section 8123(a) to a section 8106(c) determination, *see Charles A. Jackson*, 53 ECAB ___ (Docket No. 01-2010, issued July 18, 2002).

¹⁵ The Board notes that the Dr. Stewart's explanation of the need for a neurologic referral was mentioned by appellant's vocational rehabilitation counselor in a March 1, 2004 report.

¹⁶ *See Gayle Harris*, 52 ECAB 319, 321 (2001) *supra* note 14; *Martha A. McConnell*, 50 ECAB 129 (1998). Regarding the consideration of subsequently acquired conditions, *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4b(4) (December 1993).

by Board-certified specialists in other fields if, in his opinion, this was necessary to answer the Office's questions. Upon receipt of Dr. Stewart's medical report, the Office should have requested that he obtain a neurological consultation in order to fully address appellant's capacity to work in light of his lateral sclerosis condition.

CONCLUSION

The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits on the grounds that he refused suitable work.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 12, 2004 is reversed.

Issued: December 21, 2004
Washington, DC

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member