United States Department of Labor
Employees' Compensation Appeals Board

T.M., Appellant	)	
and	)	**Docket No. 06-1764**
	)	**Issued: January 30, 2007**
DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA, Employer	)	

Appearances:
John E. Goodwin, Esq., for the appellant
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

JURISDICTION

On May 12, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' May 17, 2005 merit decision concerning the termination of his compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation effective July 12, 2004 on the grounds that he refused on offer of suitable work.

FACTUAL HISTORY

On May 3, 1996 appellant, then a 39-year-old engineering technician, filed an occupational disease claim alleging that he sustained an upper extremity condition due to his repetitive work duties. The Office accepted that appellant sustained bilateral carpal tunnel syndrome and paid appropriate compensation for periods of disability. It authorized the performance of right and left carpal tunnel release surgeries on April 24, 1996 and May 7, 1997

respectively. On September 5, 1997 appellant field an occupational disease claim alleging that he sustained bilateral cubital tunnel syndrome due to his repetitive work duties. The Office accepted his claim for this condition. Appellant underwent right and left cubital tunnel release surgeries on July 8 and October 21, 1998 respectively.

On March 20, 2003 the employing establishment offered appellant a limited-duty job as a data clerk. The position required greeting visitors, answering telephones, taking down telephone messages and sending and receiving fax messages. It involved alternating periods of sitting, standing and walking and did not require repetitive upper extremity movement or pushing, pulling and lifting of significant weights.

The Office referred appellant to Dr. Scott Van Linder, a Board-certified orthopedic surgeon, and Dr. Mark Fishel, a Board-certified neurologist, for examination and an opinion on his ability to work. It provided the physicians with a description of the data clerk position.

In a report dated April 28, 2003, Dr. Van Linder and Dr. Fishel provided a comprehensive description of appellant's factual and medical history and detailed the findings of their examinations. The physicians indicated that appellant continued to have some residuals of his employment-related carpal and cubital tunnel syndromes but noted that his subjective complaints substantially outweighed any objective signs of these conditions. Dr. Van Linder and Dr. Fishel stated that appellant's motor and sensory findings were inconsistent and substantially nonphysiologic in nature and his limitation of motion was minimal. The physicians noted that appellant complained of numbness and weakness in his arms but the thickening of the skin on his hands suggested that he engaged in greater activity than reported.

Dr. Van Linder and Dr. Fishel concluded that appellant could perform the duties of the data clerk position in that they could not detect any strength, sensory or motion deficits which would prevent him from performing the position. The physicians posited that the reasons that appellant gave for not being able to perform the job, such as difficulty in getting to work and possible drowsiness due to medication use, were only "ancillary reasons" and could be overcome. Dr. Van Linder and Dr. Fishel stated that they felt appellant was significantly over-medicated and found it difficult to justify the use of methadone, particularly in daily doses of 100 milligrams, for residuals of carpal and cubital tunnel syndromes. In an accompanying work restrictions form, they indicated that appellant could walk or stand for a half hour per day, could operate a motor vehicle for one or two hours per day, could engage in repetitive wrist or elbow motion for a half hour per day and could push 50 pounds, pull 50 pounds or lift 25 pounds.

The Office provided a copy of the April 28, 2003 report of Dr. Van Linder and Dr. Fishel to Dr. Gregory P. Duff, an attending Board-certified orthopedic surgeon. In a report dated June 2, 2003, Dr. Duff stated that he was in agreement with the "bulk of their findings" and noted that appellant's condition was fixed and stable. He indicated that appellant had some residuals of the employment injury but that the "vast majority of these are subjective." In another note dated June 2, 2003, Dr. Duff stated that he had reviewed a description of the data clerk position and stated that appellant "could reasonably perform" the position. He recommended that appellant be gradually introduced to the position to delay or reduce arm symptoms.

By letter dated June 23, 2003, the Office advised appellant of its determination that the data clerk position offered by the employing establishment was suitable. It provided appellant with 30 days to accept the position or provide good cause for refusing it.

Appellant submitted a July 17, 2003 report in which Dr. Duff stated that he did not see any evidence that appellant had a progressive neuropathy which resulted in atrophy or muscular wasting. In a report dated September 8, 2003, Dr. Jon F. Hillyer, an attending Board-certified anesthesiologist, stated that appellant reported that his methadone medication made him drowsy and prevented him from driving safely. He indicated that appellant's medications, including methadone, tizanidine and naproxen, had been increased. He discussed alternate methods with appellant for dealing with his reported increased neuropathies. Dr. Hillyer stated: "We discussed driving issues and I have recommended to him if there is a question about driving he should be referred to a driving simulator in Seattle with occupational medicine to have an evaluation done by them." He indicated that appellant could return to work in a modified position.

On January 29, 2004 the employing establishment reoffered the data clerk position to appellant. The duties were the same as those contained in the prior offer except that appellant would not be required to walk or stand for more than half an hour per eight-hour day.

By letter dated April 27, 2004, the Office advised appellant of its determination that the data clerk position offered by the employing establishment on January 29, 2004 was suitable and available. The Office provided appellant with 30 days to accept the position or provide good cause for refusing it.

In a letter received by the Office on June 2, 2004, appellant stated that he was refusing the offered position due to his medical condition. In a letter dated May 24, 2004, appellant's attorney argued that appellant could not accept the offered position because his medications left him "stupefied" for much of the day.

By letter dated June 8, 2004, the Office advised appellant that his reasons for refusing the offered position were not valid and provided him with 15 days to accept the position or face termination of his compensation.

Appellant submitted a June 14, 2004 report in which Dr. Robert L. Caulkins, an attending osteopath, stated that he "is on multiple medications that have a potential to impair driving." Dr. Caulkins noted that it was his opinion that appellant "should not drive while on his present medical regimen."

By decision dated July 12, 2004, the Office terminated appellant's compensation effective July 12, 2004 on the grounds that he refused an offer of suitable work. It indicated that the medical evidence did not show that appellant's medications prevented him from performing the offered position.

Appellant requested a hearing before an Office hearing representative. At the hearing held on February 22, 2005, appellant's attorney argued that appellant took large doses of pain medication, including methadone, which impaired his ability to drive to work. He asserted that appellant lived about five miles from work and more than a mile from the nearest public

transportation stop where he could catch a ride to work. Counsel further indicated that the Office had not offered to arrange for transportation to work. Appellant acknowledged that he continued to have a driver's license and drove to and from the market near his home about once a week.

Appellant submitted an August 23, 2004 report in which Dr. Duff noted that he asked for a letter stating that he was unable to drive. Dr. Duff indicated that he was not clear why appellant could not drive and recommended that he address the issue with Dr. Hillyer if the issue was his use of methadone.

In a report dated January 6, 2005, Dr. Hillyer stated that appellant continued to have pain from the diagnosed condition of peripheral polyneuropathy, which was a manifestation of his long-term carpal and cubital tunnel syndromes. In a report dated April 1, 2005, Dr. Hillyer stated that appellant reported that his pain medications allowed him to tolerate activities, but they significantly interfered with his cognition and made it unsafe for him to drive. He recommended that appellant continue taking his medications, including methadone, tizanidine and naproxen, because they were medically necessary to maintain the lowest possible opiate dose and to preserve his function given his pain complaints. Dr. Hillyer indicated that the major sources of appellant's pain were his peripheral neuropathic changes and peripheral nerve distribution pain syndrome caused by his long-term carpal and cubital tunnel syndromes and related surgeries.

By decision dated May 17, 2005, the Office hearing representative affirmed the Office's July 12, 2004 decision.

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees' Compensation 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."[1] However, to justify such termination, the Office must show that the work offered was suitable.[2] 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.[3]

ANALYSIS

The Office accepted that appellant sustained bilateral carpal and cubital tunnel syndromes and authorized surgeries related to these conditions. By decision dated July 12, 2004, it terminated appellant's compensation effective July 12, 2004 on the grounds that he refused an offer of suitable work.

The evidence of record shows that appellant was capable of performing the data clerk position offered by the employing establishment in January 2004 and determined to be suitable by the Office in April 2004. The position was sedentary in nature and involved greeting visitors,

[1] 5 U.S.C. § 8106(c)(2).

[2] *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

[3] 20 C.F.R. § 10.124; *see Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

answering telephones, taking down telephone messages and sending and receiving fax messages. The record does not reveal that the data clerk position was temporary or seasonal in nature.[4]

In determining that appellant was capable of performing the data clerk position, the Office properly relied on the April 28, 2003 report of two Office referral physicians, Dr. Van Linder, a Board-certified orthopedic surgeon, and Dr. Fishel, a Board-certified neurologist.

In their April 28, 2003 report, Dr. Van Linder and Dr. Fishel concluded that appellant could perform the data clerk position. The physicians indicated that appellant could walk or stand for a half hour per day, could operate a motor vehicle for one or two hours per day, could engage in repetitive wrist or elbow motion for a half hour per day and could push 50 pounds, pull 50 pounds or lift 25 pounds.[5] These restrictions would clearly allow appellant to perform the limited physical requirements of the offered data clerk position. Dr. Van Linder and Dr. Fishel provided extensive medical rationale to explain why they only recommended limited work restrictions. They indicated that appellant continued to have some residuals of his employment-related carpal and cubital tunnel syndromes but noted that his subjective complaints substantially outweighed any objective signs of these conditions. Dr. Van Linder and Dr. Fishel stated that appellant's motor and sensory findings were inconsistent and substantially nonphysiologic in nature. The physicians noted that appellant complained of numbness and weakness in his arms but the thickening of the skin on his hands suggested that he engaged in greater activity than reported. Dr. Van Linder and Dr. Fishel indicated that appellant was significantly over-medicated for his given condition and that his reasons for not being able to perform the job, such as difficulty in getting to work and possible drowsiness due to medication use, were only "ancillary reasons" and could be overcome.[6]

Appellant alleged that he took large doses of pain medication, including methadone, which impaired his ability to drive to work and hence prevented him from performing the data clerk position. He asserted that he lived about five miles from work and more than a mile from the nearest public transportation stop where he could catch a ride to work. Although under some circumstances the inability to get to and from work due to a medical condition could be an acceptable reason for refusing an offered position, appellant has not shown that his medication usage provided him with good cause to refuse the data clerk position.[7]

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[4] *See* Federal (FECA) Procedure Manual, Part 2 -- Claim, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4b (July 1997).

[5] At the time of the April 28, 2003 report, the employing establishment had offered an earlier version of the data clerk position, which had more expansive walking and standing requirements than those contained in the position offered on January 29, 2004.

[6] In a note dated June 2, 2003, Dr. Duff, an attending Board-certified orthopedic surgeon, stated that he had reviewed a description of the data clerk position and noted that appellant "could reasonably perform" the position. He recommended that appellant be gradually introduced to the position to delay or reduce arm symptoms, but did not indicate that this recommendation was based on appellant's physical limitations.

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

In reports dated September 8, 2003 and April 1, 2005, Dr. Hillyer, an attending Board-certified anesthesiologist, stated that appellant reported that his methadone medication made him drowsy and prevented him from driving safely. However, Dr. Hillyer did not clearly provide his own opinion that appellant's medications prevented him from driving such that he could not travel to and from the location of the data clerk position. Moreover, Dr. Hillyer did not explain why appellant's extremely limited symptoms justified his medication regimen nor is it clear that appellant's medication regimen would render him sufficiently impaired to be unable to drive the five miles from his home to work or otherwise render him incapable of performing the data clerk position.

Appellant submitted a June 14, 2004 report in which Dr. Caulkins, an attending osteopath, stated that he "is on multiple medications that have a potential to impair driving." Dr. Caulkins noted that it was his opinion that appellant "should not drive while on his present medical regimen." However, Dr. Caulkins did not provide any explanation for this opinion. He did not provide any findings on examination or diagnostic testing which would explain why appellant would require such extensive medication. The Board further notes that, in addition to the fact that Dr. Van Linder and Dr. Fishel indicated that appellant's medication did not prevent him from performing the data clerk position, the record also contains an August 23, 2004 report in which Dr. Duff indicated that he was not clear why appellant could not drive.

For these reasons, the Office properly terminated appellant's compensation effective July 12, 2004 on the grounds that he refused an offer of suitable work.[8]

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation effective July 12, 2004 on the grounds that he refused an offer of suitable work.

[8] The Board notes that the Office complied with its procedural requirements prior to terminating appellant's compensation, including providing appellant with an opportunity to accept the data clerk position after informing him that his reasons for initially refusing the position were not valid; *see generally Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' May 17, 2005 decision is affirmed.

Issued: January 30, 2007
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