United States Department of Labor
Employees' Compensation Appeals Board

M.C., Appellant	)	
and	)	**Docket No. 07-544**
	)	**Issued: May 8, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Savannah, GA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 19, 2006 appellant filed a timely appeal of a November 20, 2006 merit decision of the Office of Workers' Compensation Programs with respect to the termination of her compensation benefits under 5 U.S.C. § 8106(c)(2). 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 June 12, 2004 on the grounds that he refused an offer of suitable work under 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On October 11, 2002 appellant, a truck driver, filed a traumatic injury claim (Form CA-1) alleging that he sustained knee injuries when the hydraulic lift he was standing on lost pressure

and collapsed to the ground. The Office accepted bilateral sprain/strain of the knees, leg contusions and aggravation of left knee arthritis.[1]

Edward Allcock, an attending osteopath, opined that appellant was totally disabled for work in a report dated May 5, 2003. He diagnosed degenerative changes of the lumbar spine and left knee, with chronic low back and knee pain. The Office referred appellant for a second opinion examination by Dr. Douglas Hein, an orthopedic surgeon. In a report dated June 2, 2003, Dr. Hein provided a history and results on examination. He indicated that appellant had degenerative changes in the knees and back. Dr. Hein stated that the degenerative changes antedated the employment injury and did not establish an ongoing aggravation of the spinal condition. He found that the contusions and strains to the right knee had resolved, but there was ongoing difficulty with the left knee. Dr. Hein completed a work capacity evaluation (OWCP5-c) indicating that appellant could work with restrictions such as one hour of walking and standing, and a 10-pound lifting restriction.

The Office determined that a conflict in the medical evidence existed with respect to appellant's ability to work. Appellant was referred to Dr. H. Clark Deriso, a Board-certified orthopedic surgeon, for a referee examination. By report dated August 12, 2003, Dr. Deriso provided a history and results on examination. He diagnosed probable early osteoarthritis of the left knee, early osteoarthritis of the right knee and history of chronic back pain. Dr. Deriso stated:

> "I would agree with the recommendation of Dr. Douglas Hein that this gentleman certainly would be able to work in a sedentary capacity eight hours a day five days a week. This gentleman has had chronic changes in his knee that have been present for several years and not just from an accident 10 months ago. Again, I think [appellant] can perform modified lighter-type work with no lifting greater than 10 pounds. He indeed does have arthritis of his knees and degenerative disc of the lumbar spine by x-ray. He had these prior to his reported injury of October 2002."

In a letter dated October 23, 2003, the employing establishment offered appellant a full-time position as a modified mail processing clerk. The physical requirements included lifting up to 10 pounds intermittently for one hour, intermittent sitting for seven hours and one-half hour intermittent standing. Appellant rejected the offer on November 3, 2003.

By letter dated April 21, 2004, the Office advised appellant that the offered position was considered suitable. The provisions of 5 U.S.C. § 8106(c)(2) were noted and appellant was advised to accept the position or provide reasons for his refusal within 30 days. His representative submitted a May 11, 2004 letter stating that appellant had gone to the employing establishment on or about May 6, 2004 and was told there was no job available for him. He stated that appellant spoke with a Maxine Wilson by telephone, and was advised that his disability retirement was approved and no job was available. The representative stated that appellant's attending physician continued to report that appellant was totally disabled.

[1] The Office did not accept aggravation of left knee arthritis until December 17, 2003.

In a memorandum of telephone call dated May 19, 2004, the Office indicated that Ms. Wilson had been contacted and was advised that the offered job was still available. According to Ms. Wilson, appellant had stated that he was on disability retirement and had no intention of returning to work.

By letter dated May 21, 2004, the Office found that the reasons offered were insufficient. The Office stated that the offered job remained available and appellant had 15 days to accept the position or a final decision would be issued. On May 27, 2004 the Office received a December 18, 2003 report from Dr. Allcock who opined that appellant was totally disabled. Appellant also submitted a July 10, 2003 letter from a rehabilitation nurse stating that appellant had been released to return to work on April 21, 2003 but he stopped after six hours and was determined to be permanently disabled.

In a decision dated June 10, 2004, the Office terminated compensation for wage loss effective June 12, 2004 on the grounds that appellant had refused an offer of suitable work. The Office discussed the evidence submitted on May 27, 2004 and found that the weight of the evidence rested with Dr. Deriso. Appellant requested a hearing, which was held on May 24, 2005. He submitted reports from Dr. Christopher Oldfield regarding his continuing treatment.

By decision dated September 6, 2005, the hearing representative affirmed the June 10, 2004 decision. The hearing representative found that Dr. Deriso represented the weight of the evidence regarding appellant's work capacity and that the offered job was suitable.

Appellant requested reconsideration in a letter received by the Office on August 30, 2006. He submitted a June 5, 2006 report from Dr. Oldfield, who diagnosed chronic leg pain and low back pain secondary to degenerative changes in knees and low back. Dr. Oldfield opined that these conditions initially started as a result of the employment injury in October 2002.

In a decision dated November 20, 2006, the Office reviewed the case on its merits and denied modification of the prior decisions.

LEGAL PRECEDENT

5 U.S.C. § 8106(c) 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." 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.[2] To justify such a termination, the Office must show that the work offered was suitable.[3] An employee who refuses or neglects to work

[2] *Henry P. Gilmore*, 46 ECAB 709 (1995).

[3] *John E. Lemker*, 45 ECAB 258 (1993).

after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[4]

With respect to the procedural requirements of termination under section 8106(c), the Board has held that the Office must inform appellant of the consequences of refusal to accept suitable work and allow appellant an opportunity to provide reasons for refusing the offered position.[5] If appellant presents reasons for refusing the offered position, the Office must inform appellant if it finds the reasons inadequate to justify the refusal of the offered position and afford appellant a final opportunity to accept the position.[6]

It is well established that when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[7]

ANALYSIS

The initial question presented is whether the offered job was medically suitable. There was a conflict in the medical evidence between Dr. Allcock, the attending physician, and the second opinion physician, Dr. Hein, regarding appellant's ability to work. Dr. Allcock opined that appellant was totally disabled, while Dr. Hein found that appellant could work full time within specified restrictions. The Federal Employees' Compensation Act provides that, 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 the examination.[8] This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[9]

Dr. Deriso, the referee examiner, noted that appellant had degenerative changes to the knees and back that preexisted the employment injury. He provided an unequivocal opinion that appellant was capable of working eight hours in a light-duty position. Dr. Deriso indicated that appellant should not lift more than 10 pounds. The Board finds that he provided a reasoned medical opinion that is entitled to the special weight accorded to a referee examiner.

The offered position did not require more than 10 pounds lifting. It was a sedentary position with lifting up to 10 pounds for one hour intermittently. The offered position conforms to the restrictions noted by Dr. Deriso. The Board finds that, based on the weight of the medical evidence, the offered position of modified mail processing clerk was medically suitable.

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[4] *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.517(a).

[5] *Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).

[6] *Id.*

[7] *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

[8] 5 U.S.C. § 8123(a).

[9] 20 C.F.R. § 10.321 (1999).

The Office notified appellant of its finding that the modified secretary job offer was suitable and of the consequences for not accepting a suitable offer. Appellant argued that the position was not available. The Office, however, confirmed with the employing establishment that the position remained available. With respect to appellant's argument that his attending physician found him totally disabled, the case, as noted above, was sent to a referee examiner to resolve a conflict. The referee physician's reasoned opinion is entitled to special weight and represents the weight of the medical evidence. Additional reports from a physician on one side of the conflict that is properly resolved by a referee examiner are generally insufficient to overcome the weight accorded the referee's report or create a new conflict.[10] Dr. Allcock's additional reports are essentially repetitive of his stated opinion on appellant's disability status.

In accord with established procedures, the Office provided appellant an additional 15 days to accept the position prior to termination of compensation. The Board finds that the job offered was medically and vocationally suitable, and the Office followed its procedures prior to termination of compensation. Accordingly, the Board finds that the Office met its burden of proof to terminate compensation for wage loss effective June 12, 2004.

Following the June 10, 2004 decision, appellant submitted medical evidence regarding his continuing treatment from Dr. Oldfield.[11] In his June 5, 2006 report, Dr. Oldfield opined that appellant was permanently disabled. The issue is whether appellant was capable of performing the mail processing clerk position at the time it was offered. Dr. Oldfield does not discuss the offered position or provide a reasoned opinion on the issue presented.

CONCLUSION

The Office met its burden of proof to terminate compensation effective June 12, 2004 on the grounds that appellant had refused an offer of suitable work.

[10] *See Harrison Combs, Jr., supra* note 7; *Dorothy Sidwell*, 41 ECAB 857 (1990).

[11] The Board notes that, while appellant submitted a new medical report on appeal, the Board can review only evidence that was before the Office at the time of the final decision on appeal. 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 20, 2006 is affirmed.

Issued: May 8, 2007
Washington, DC

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

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

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