United States Department of Labor
Employees' Compensation Appeals Board

D.P., Appellant	)	
and	)	**Docket No. 08-2339**
	)	**Issued: May 22, 2009**
DEPARTMENT OF THE ARMY, HUMAN RESOURCES COMMAND, Alexandria, VA, Employer	)	

Appearances:
Capp P. Taylor, Esq., for the appellant
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 August 25, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' November 16, 2007 and July 31, 2008 merit decisions regarding 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 November 16, 2007 on the grounds that he refused an offer of suitable work.

FACTUAL HISTORY

The Office accepted that on February 6, 1997 appellant, then a 41-year-old computer specialist, sustained a lumbar strain and aggravation of degenerative disc disease of the lumbar spine when he attempted to untangle cable under an employee's desk at work. Appellant stopped work on October 22, 1997 and received Office compensation for periods of disability.

Appellant received treatment for his back problems from Dr. David Petersen, an attending Board-certified orthopedic surgeon. In an undated report received by the Office in November 2005, Dr. Petersen asserted that appellant was "not gainfully employable" due to his chronic back pain. He indicated that appellant's condition was permanent in nature.[1] In a September 26, 2005 report, Dr. Adam Bright, a Board-certified orthopedic surgeon, who served as an Office referral physician, agreed with Dr. Petersen that appellant had continuing residuals of his accepted employment injuries. He indicated that appellant could perform sedentary, light-duty work for four hours per day with restrictions such as lifting no more than five pounds.[2]

A functional capacity evaluation (FCE) was performed on October 11, 2005 which showed that appellant could perform activities at a "light-sedentary physical demand level." The findings that appellant could only sit for one to two hours per day in 10-minute intervals was marked as "conditionally valid." The evaluator noted that appellant displayed inconsistencies in performing various tasks.

The Office determined that there was a conflict in the medical opinion between Dr. Petersen and Dr. Bright regarding the extent to which appellant was able to work. In October 2006 it referred appellant to Dr. Howard Schuele, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.[3]

In a November 2, 2006 report, Dr. Schuele stated that on examination appellant did not exhibit back muscle firmness or spasms upon range of motion testing. Appellant had full lateral bending and rotation of his back but expressed pain on some back motions. He was able to heel walk, toe walk and do a deep knee bend, his straight leg raising was 90/90 with slight pain, sensation in his lower extremities was intact and there were no signs of atrophy. Dr. Schuele indicated that diagnostic testing showed mild lumbar disc degeneration without disc herniation. He indicated that appellant suffered from a permanent lumbar condition and noted that appellant could perform sedentary, light-duty work for four hours per day. In a November 10, 2006 work restrictions form, Dr. Schuele stated that appellant could work for four hours per day, sit for four hours per day, walk or stand for two hours per day and lift, push or pull up to five pounds for one hour per day. He could not twist, bend, squat, kneel or climb and needed to take a 10-minute break every 90 minutes.

In January 2007 the employing establishment offered appellant a light-duty job as a modified information technology specialist for four hours per day. The job involved performing simple clerical tasks. The employing establishment required sitting for four hours per day, walking or standing for two hours per day and lifting, pushing or pulling up to five pounds for one hour per day. The job did not require twisting, bending, squatting, kneeling or climbing and allowed 10-minute breaks every 90 minutes.

[1] Dr. Petersen indicated that appellant drove his car for 5,000 miles per year. He continued to produce reports indicating that appellant was totally disabled.

[2] In mid October 2005 Dr. Bright indicated that appellant could perform more arduous work including lifting up to 10 pounds. He stated that appellant could work six hours per day.

[3] In an August 25, 2006 report, Dr. Ron Lopez, an attending Board-certified psychiatrist, stated that appellant had a major depressive disorder that was in partial remission.

In a September 4, 2007 letter, the Office advised appellant of its determination that the modified information technology specialist position offered by the employing establishment was suitable. It informed appellant that his compensation would be terminated if he did not accept the position or provide good cause for not doing so within 30 days of the date of the letter.

In a September 24, 2007 letter, appellant's attorney stated that appellant was refusing the offered position because it was unsuitable. Counsel asserted that the position of modified information technology specialist failed to take into account the claimant's various medical conditions, including diabetes, arthritis and major depressive disorder. He indicated that appellant took numerous prescription medications daily and was not able to drive. In an October 4, 2007 letter, the Office advised appellant that his reasons for not accepting the position offered by the employing establishment were unjustified. It advised appellant that his compensation would be terminated if he did not accept the position within 15 days of the date of the letter. Appellant did not accept the job within the allotted time.[4]

In a November 16, 2007 decision, the Office terminated appellant's compensation effective November 16, 2007 on the grounds that he refused an offer of suitable work. It indicated that the weight of the medical evidence regarding appellant's ability to work rested with the well-rationalized opinion of Dr. Schuele.

Appellant requested a hearing before an Office hearing representative regarding his claim. At the telephone hearing held on June 4, 2008, he testified that he had been under the care of Dr. Lopez for four years. Appellant asserted that he suffers from chronic pain and cannot concentrate or read due to his medications which included morphine and Percocet. He testified that he could not sit or stand for extended periods of time but noted that he is able to drive a car and operated a garden tractor at his house. Counsel argued that the medical report of Dr. Schuele was contradictory and not supported by the results of the FCE performed on October 11, 2005. He contended that the Office failed to take into account all of the claimant's medical conditions when it determined that the job offer was suitable. It also failed to consider the amount of medications that appellant takes.

Appellant submitted a March 10, 2008 report in which Dr. Lopez indicated that he treated appellant for a major depressive disorder which he believed was mostly related to his back injury and the resulting chronic pain. Dr. Lopez stated:

> "I have reviewed the job offer dated January 8, 2007. I do not believe that [appellant] would be capable of performing the duties of this job as he is incapable of performing anything but a very minimal stress position. Additionally, I believe the physical activities will exacerbate his chronic pain and, thus, aggravate his major depressive disorder to the point that he would be a risk to himself and others due to anxiety and lack of concentration."

In a July 31, 2008 decision, the Office hearing representative affirmed the Office's July 31, 2008 decision indicating the evidence from the time of that decision showed that the

[4] On September 20, 2007 appellant underwent an FCE which showed that he could perform light-duty work with restrictions such as no lifting over 18 pounds.

offered position was suitable. He indicated that appellant later submitted a March 10, 2008 report of Dr. Lopez which required remanding the case to it for further development to determine whether he had an emotional condition which prevented him from performing the offered position. The Office hearing representative indicated that appellant's compensation would not be reinstated because there was no evidence of psychiatric disability when appellant's compensation was terminated effective November 16, 2007.

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees' Compensation Act provides in pertinent part, "A partially disabled employee who refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[5] However, to justify such termination, the Office must show that the work offered was suitable.[6] 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.[7]

Section 8123(a) of the Act provides in pertinent part: "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."[8] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[9] In situations where 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.[10]

ANALYSIS

The Office accepted that on February 6, 1997 appellant sustained a lumbar strain and aggravation of degenerative disc disease of the lumbar spine when he attempted to untangle cable under an employee's desk at work. Appellant stopped work on October 22, 1997 and in January 2007 the employing establishment offered him light-duty work as a modified information technology specialist. The job involved performing simple clerical tasks. It required sitting for four hours per day, walking or standing for two hours per day and lifting, pushing or pulling up to five pounds for one hour per day. The job did not require twisting, bending, squatting, kneeling or climbing and allowed 10-minute breaks every 90 minutes.

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[5] 5 U.S.C. § 8106(c)(2).

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

[7] 20 C.F.R. § 10.517; *see Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

[8] 5 U.S.C. § 8123(a).

[9] *William C. Bush*, 40 ECAB 1064, 1975 (1989).

[10] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

In determining that appellant was physically capable of performing the modified information technology specialist position, the Office properly relied on the opinion of Dr. Schuele, a Board-certified orthopedic surgeon who served as an impartial medical specialist.[11]

The Office properly determined that there was a conflict in the medical opinion between Dr. Petersen, an attending Board-certified orthopedic surgeon and Dr. Bright, a Board-certified orthopedic surgeon who served as an Office referral physician, regarding the extent to which appellant was able to work. In several reports dated from late 2005 onwards, Dr. Petersen asserted that appellant was not gainfully employable due to his chronic back pain. In contrast, Dr. Bright indicated in a September 26, 2005 report that appellant could perform sedentary, light-duty work for four hours per day with restrictions on such activities such as lifting.[12] In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Schuele for an impartial medical examination and an opinion on the matter.

In a November 2, 2006 report, Dr. Schuele stated that on examination appellant did not exhibit back muscle firmness or spasms upon range of motion testing. He had full lateral bending and rotation of his back but expressed pain on some back motions. Appellant was able to heel walk, toe walk and do a deep knee bend, his straight leg raising was 90/90 with slight pain, sensation in his lower extremities was intact and there were no signs of atrophy. He found that appellant could perform sedentary, light-duty work for four hours per day. In a November 10, 2006 work restrictions form, Dr. Schuele stated that appellant could work for four hours per day, sit for four hours per day, walk or stand for two hours per day and lift, push or pull up to five pounds for one hour per day. He could not twist, bend, squat, kneel or climb and needed to take a 10-minute break every 90 minutes. Dr. Schuele indicated that these work restrictions were appropriate given appellant's limited findings on examination and diagnostic testing.

The Office properly found that the weight of the medical evidence regarding appellant's ability to work rested with the well-rationalized report of Dr. Schuele, whose recommended work restrictions would allow appellant to perform the position of modified information technology specialist offered by the employing establishment. The Board notes that, therefore, the Office has established that the position of modified information technology specialist is suitable. As noted above, once it has established that a particular position is suitable, 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. The Board has carefully reviewed the evidence and argument submitted by appellant in support of his refusal of the modified information technology specialist position and notes that it is not sufficient to justify his refusal of the position.

[11] The record does not reveal that the offered position was temporary or seasonal in nature or that the position was vocationally inappropriate. *See* Federal (FECA) Procedure Manual, Part 2 -- Claim, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2-814.4b (July 1997).

[12] In mid October 2005 Dr. Bright indicated that appellant could perform more arduous work including lifting up to 10 pounds. He stated that appellant could work six hours per day.

Appellant alleged that he was not able to sit for the lengths of time required by the modified information technology specialist position. Although the FCE performed in 2005 indicated that the claimant could only sit for 10 minutes at a time, the FCE performed in 2007 revealed no such limitations. Appellant claimed that he would not be able to concentrate, read or drive to the work site due to the medications that he takes. However, he testified that he drives on a regular basis and there is no rationalized medical evidence showing that the medications would prevent him from driving, concentrating or reading. Appellant alleged that the Office failed to take into account his nonwork-related conditions, including arthritis and diabetes. The Board notes that there is no medical evidence in the record showing that appellant is disabled due to these conditions.

For these reasons, the Office properly terminated appellant compensation effective November 16, 2007 on the grounds that he refused an offer of suitable work.[13] The Board further notes that the Office properly remanded the case to it after it received a March 10, 2008 report in which Dr. Lopez, an attending Board-certified psychiatrist, indicated that appellant was disabled due to a depressive disorder.[14] The Office hearing representative properly indicated that appellant's compensation would not be reinstated because there was no evidence of psychiatric disability when his compensation was terminated effective November 16, 2007.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation effective November 16, 2007 on the grounds that he refused an offer of suitable work.

[13] In mid October 2005 Dr. Bright indicated that appellant could perform more arduous work including lifting up to 10 pounds. He stated that appellant could work six hours per day.

[14] The Board notes that the report was not sufficiently well rationalized to establish such total disability but the report did require remanding the case to the Office for further development.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' July 31, 2008 and November 16, 2007 decisions are affirmed.

Issued: May 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