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M.G., Appellant	)	
	)	
and	)	Docket No. 11-1008
	)	Issued: November 15, 2011
U.S. POSTAL SERVICE, PERFORMANCE	)	
CLUSTER, Boston, MA, Employer	)	
	)	

Oral Argument October 18, 2011

No appearance, for the Director

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

On March 16, 2011 appellant filed a timely appeal from the February 17, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) terminating his compensation. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of his case.

The issue is whether OWCP properly terminated appellant's compensation effective November 27, 2005 on the grounds that he refused an offer of suitable work.

In early 2005, OWCP accepted that appellant, then a 63-year-old mechanic, sustained a work-related temporary aggravation of a preexisting varicose vein condition of his right leg. Appellant received compensation for periods of disability.

¹ 20 C.F.R. § 8101 *et seq.*

In early October 2005, the employing establishment offered appellant a job as a modified mail processing equipment (MPE) mechanic. The job description for the offered position indicated that there would be restrictions on various activities, including the number of hours a day appellant could stand, walk and lift. Appellant did not accept the modified MPE mechanic position.

In a November 22, 2005 decision, OWCP terminated his compensation effective November 27, 2005 on the grounds that he refused an offer of suitable work. It found that the medical evidence of record showed that appellant could perform the offered position.

In decisions dated July 19, 2006, February 14 and August 27, 2008, OWCP affirmed the termination of appellant's monetary compensation effective November 27, 2005 on the grounds that he refused an offer of suitable work. In a May 1, 2009 decision, it denied his request for merit review of his claim.

Appellant filed an appeal with the Board which included a request for oral argument. On June 23, 2010 the Board issued an order granting his request.

On August 9, 2010 the Director of OWCP filed a motion to reverse, remand and cancel oral argument. The Director acknowledged that the evidence did not establish that appellant had refused an offer of suitable work as OWCP did not consider all of his current conditions in evaluating the suitability of the modified MPE mechanic position. Upon remand, OWCP would reinstate appellant's compensation upon receipt of a completed (Form CA-1032) indicating whether he had earnings during the period in question. It would prepare a statement of accepted facts and refer him for a second opinion examination in order to determine the nature and extent of any remaining employment-related disability. The Director also advised that further development was required regarding the issue of whether the facility at which the offered position was located required extensive walking.

In an August 19, 2010 order, the Board reversed OWCP's August 27, 2008 and May 1, 2009 decisions and canceled the oral argument scheduled for September 9, 2010. The Board remanded the case for further development consistent with the Director's August 9, 2010 motion.

On remand, OWCP referred appellant to Dr. David R. Campbell, a Board-certified vascular surgeon, for an opinion on his ability to work, including his ability to work in the modified MPE mechanic position offered in October 2005. Dr. Campbell provided reports dated January 12 and 28, 2011. He found that appellant was capable of performing the modified MPE mechanic position.² The record contains a Form CA-1032 completed by appellant on October 4, 2010 in which he indicated that he had not worked in the 15 months prior to the completion of the form. It does not appear from the record that OWCP reinstated appellant's compensation.

In a February 17, 2011 decision, OWCP noted that it had carried out evidentiary development as instructed by the Board and found that it had "determined that the record evidence does not support entitlement to wage[-]loss benefits under [FECA] for your claimed

² Dr. Campbell stated, "It is my opinion upon review of the records as of October 12, 2005, that [appellant] should have been able to work in the modified limited-duty job offered to him."

disability.” It discussed Dr. Campbell’s reports and stated, “[a]ccordingly, the weight of the medical evidence of record supports the prior decision of [OWCP] in terminating your compensation based on your refusal of a suitable job offer.”

LEGAL PRECEDENT

Section 8106(c)(2) of FECA 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.”³ However, to justify such termination, OWCP must show that the work offered was suitable and must inform the claimant of the consequences of refusal to accept such employment.⁴ 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.⁵

OWCP regulations state that in determining what constitutes suitable work for a particular employee with a disability, it 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.⁶

ANALYSIS

In its August 19, 2010 order, the Board reversed OWCP’s August 27, 2008 merit decision which affirmed its prior termination of appellant’s compensation effective November 27, 2005 on the grounds that he refused an offer of suitable work. The reversal was based on the August 9, 2010 motion of the Director of OWCP which acknowledged that the evidence did not establish that appellant refused an offer of suitable work. OWCP did not consider all of appellant’s current conditions in evaluating the suitability of the modified MPE mechanic position. It noted his compensation would be reinstated upon receipt of a completed Form CA-1032 addressing any earnings during the period in question. Further development would be carried out, including referral for a second opinion examination and whether the facility at which the offered position was located required extensive walking.

³ 5 U.S.C. § 8106(c)(2).

⁴ *T.T.*, 58 ECAB 296 (2007).

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

⁶ *See M.M.*, 58 ECAB 567 (2007). *See also T.S.*, 59 ECAB 490 (2008).

Upon remand, OWCP did not reinstate appellant's compensation despite the Board's reversal of the termination of appellant's compensation based on the Director's motion. Appellant completed a Form CA-1032 on October 4, 2010 in which he indicated that he had not worked in the 15 months prior to the completion of the form. OWCP further developed the medical evidence but essentially found that the November 2005 termination was valid based on the medical opinion of Dr. Campbell, a Board-certified vascular surgeon obtained in January 2011.

The Board finds that OWCP's November 2005 termination decision was previously reversed. OWCP may not retroactively "cure" such reversal of such a termination by presenting medical evidence in 2011 when it was not established that the position offered in 2005 considered all his medical conditions. When terminating compensation for refusal of suitable work, it must present contemporaneous medical evidence and provide due process safeguards.⁷ OWCP did not comply with these requirements. The Board found that it did not properly terminate appellant's compensation effective November 27, 2005 on the grounds that he refused an offer of suitable work as acknowledged by the Director.⁸

For these reasons, the February 17, 2011 decision of OWCP is reversed. OWCP shall provide appellant with a Form CA-1032 and, upon completion of such a form, shall reinstate his compensation.

CONCLUSION

The Board finds that OWCP improperly terminated appellant's compensation in the February 17, 2011 decision.

⁷ See *supra* notes 4 and 6.

⁸ The Board notes that, in attempting to find a refusal of suitable work on February 17, 2011 OWCP did not provide appellant notice of its finding that the offered position was suitable or remained available. See Y.A., 59 ECAB 701 (2008); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

ORDER

IT IS HEREBY ORDERED THAT the February 17, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 15, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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