United States Department of Labor
Employees' Compensation Appeals Board

I.B., Appellant	)	
and	)	**Docket No. 11-1461**
	)	**Issued: May 14, 2012**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION WADSWORTH MEDICAL CENTER, Los Angeles, CA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On June 7, 2011 appellant, through his attorney, filed an appeal from a January 6, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) that affirmed the termination of his wage-loss compensation on the grounds that he refused an offer of suitable work. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly terminated appellant's compensation benefits on September 1, 2010 pursuant to 5 U.S.C. § 8106(c).

On appeal, appellant asserts that OWCP failed to sufficiently document the effort to locate work in Las Vegas, Nevada; the offered position was not at a proper pay grade; it failed to

[1] 5 U.S.C. §§ 8101-8193.

consider preexisting and subsequently acquired conditions; and the opinion of OWCP's physician was not well rationalized and based on an incomplete statement of accepted facts.

FACTUAL HISTORY

On August 9, 1985 appellant, then a 34-year-old psychiatric nursing assistant, injured his right foot when a wheelchair toppled onto him. He stopped work on August 12, 1985; did not return and was placed on the periodic compensation rolls. OWCP accepted that appellant sustained a contusion and ganglion cyst to his right foot. The employing establishment removed him from employment effective October 31, 1985 for excessive absences beginning on April 28, 1985. On December 17, 1985 Dr. Howard Rodman, a Board-certified orthopedic surgeon, performed ganglion and exostosis excision. On December 19, 1986, April 13, 1989 and May 15, 1995 Dr. Ronald Miller, a podiatrist, performed additional surgery, including a release of nerve entrapment. Appellant was in a nonemployment-related motor vehicle accident in December 1998 and hurt his back. He moved to Las Vegas, Nevada in 1999.[2]

On November 15, 1999 appellant returned to work at the employing establishment as an information receptionist.[3] On March 15, 2000 OWCP reduced his compensation to $74.00 each compensation period, based on his actual earnings. Appellant continued in that position until the spring of 2000. On June 12, 2000 he began a full-time temporary position as a clerk with the Federal Bureau of Reclamation in Boulder City, Nevada. Appellant resigned from that position for medical reasons on June 22, 2000. He was returned to the periodic compensation rolls on total disability beginning June 23, 2000. On October 1, 2001 Dr. Miller performed an excision of neuroma of the second interspace of the right foot. OWCP accepted exostosis of right foot and mononeuritis of the right lower limb.

In an August 10, 2005 report, Dr. Ira Weiner, a podiatrist, advised that appellant was suffering from chronic pain syndrome aggravated by the employment injury. He was permanently disabled from work that involved his lower extremities. Dr. Weiner found that appellant could work for eight hours a day in a sedentary position, using his hands.[4]

On November 30, 2009 OWCP referred appellant to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, for an updated second-opinion evaluation. In a December 14, 2009 report, Dr. Swartz reviewed the statement of accepted facts and medical record, noting appellant's history of renal cell carcinoma, hypertension, chronic asthma and bronchitis. He reported that appellant stated that he had continuing back pain following a nonwork-related

[2] Appellant was referred to vocational rehabilitation in 1989 and rehabilitation efforts continued through October 1990. In 1996, he was offered a file clerk position, which was approved by Dr. Miller.

[3] The job was as classified as GS-5, Step 2, at an annual salary of $23,649.00 per year.

[4] Dr. Reynold Rimoldi, a Board-certified orthopedic surgeon, performed a second-opinion evaluation in May 2001. The record contains no medical reports subsequent to his evaluation until the August 10, 2005 report from Dr. Weiner. By decision dated June 29, 2007, OWCP found that an overpayment of compensation in the amount of $1,636.00 was created because appellant was erroneously sent duplicate compensation checks for the period January 23 to February 19, 2005. Appellant was found at fault and recovery from future compensation was scheduled at the rate of $150.00 each compensation period.

motor vehicle accident that occurred in 1998 and persistent cervical spine and upper extremity pain from a 2009 motor vehicle accident when he sustained a whiplash injury. Appellant reported that his foot became worse after each surgical procedure and that his right foot became swollen when he was on his feet for 10 or 15 minutes. He walked with a limp, had pronated feet and reported that he used a cane at all times. Dr. Swartz advised that appellant could not stand or weight bear with the toes of his right foot and on examination had hyperalgesias over the surgical scars, had decreased toe range of motion and one centimeter of right calf atrophy. Ankle motion was symmetrical. Dr. Swartz diagnosed cutaneous nerve entrapment and degenerative changes as shown on magnetic resonance imaging (MRI) scan studies. He noted that appellant maintained that he was tender to light fingertip touch throughout the right foot. Dr. Swartz considered this symptom magnification on appellant's part and found that the inability to fully weight bear was an exaggerated response, opining that his residuals would not result in an inability to weight bear or cause substantial physical restrictions. Back examination demonstrated painful lumbar range of motion and appellant was tender to light touch over the left renal surgical scar. Dr. Swartz noted MRI scan findings of degenerative changes in the low back and an annular tear and bulge at L5-S1. He advised that appellant could not return to the nursing assistant position.

In a December 23, 2009 work capacity evaluation, Dr. Swartz advised that appellant could work eight hours a day with climbing stairs restricted to one hour daily; squatting and kneeling restricted to two hours daily; bending, pushing, pulling and lifting and operating a motor vehicle to four hours daily; and walking and standing restricted to six hours daily, with a 25-pound weight restriction. He indicated that the restrictions were permanent and included nonwork-related conditions as well.

On January 27, 2010 OWCP referred appellant to Marcia Brier, M.S., for vocational rehabilitation. Appellant underwent vocational testing on March 16, 2010 that demonstrated that he could perform sedentary, clerical duties with some employment training in basic computer skills.

On March 23, 2010 the employing establishment offered appellant a full-time position in Los Angeles, California, as an information receptionist, GS-679-3, Step 10, at an annual salary of $36,103.00. The duties of the sedentary position were described as monitoring visitors and alerting nursing staff to patients that wander with physical requirements of standing and walking not to exceed six hours; occasional lifting or carrying light items not to exceed 10 pounds; and no squatting, kneeling, climbing or operating a motor vehicle.

On April 23, 2010 appellant submitted a May 5, 2008 MRI scan study of the right foot that demonstrated mild osteoarthritic changes at the first metatarsophalangeal joint with plantar plate degeneration, mild sprain and scarring-type signal changes. In a July 31, 2008 report, Dr. Robert D. Larson, a podiatrist, noted appellant's complaint of difficulty walking on his right foot and provided examination findings. Appellant's assessment was rule out chronic regional pain syndrome, entrapment neuropathy or more proximal etiologies. A December 12, 2009 MRI scan study of the cervical spine demonstrated the Dandy Walker variant; straightening of cervical lordosis; multilevel cervical degenerative disc disease; annual tears at C3-4, C4-5 and C5-6 levels with noncompressive disc bulging and C6-7 noncompressive disc bulging and mild neural foraminal stenosis. In a February 9, 2010 report, Dr. Brian Lemper, an osteopath, noted

that appellant was provided with a lumbar support, described his medications and recommended cervical facet blocks. A March 30, 2010 x-ray of the right foot demonstrated stable right calcaneal spurs and degenerative changes of the first metatarsophalangeal joint. In an April 12, 2010 treatment note, Dr. Michael Minev, a Board-certified internist, noted appellant's complaint of right foot pain and listed work limitations. Examination findings included tenderness to palpation of the right forefoot and plantar surface at the second metatarsal and between the second and third metatarsals. Diagnoses included chronic neck sprain/strain, a right rotator cuff repair in September 2009, lumbar spine degenerative disc disease, chronic hepatitis C, resection for renal cell carcinoma in April 2007, dyspnea and continued severe pain of the right foot.

By letter dated April 28, 2010, appellant refused the offered position, asserting that it was not medically suitable or comport with Dr. Swartz' report, which was inconsistent with his medical limitations. He contended that a conflict existed between the limitations provided by his physician and those of Dr. Swartz. Appellant further stated that he was medically unable to relocate from his home in Las Vegas or to travel any distance for any reason, stating that he was in severe pain much of the time. He argued that the offered position was not reasonable because when he left employment he was a level 5 or 7 and that the job offer did not comport with Office of Personnel Management (OPM) regulations.

On June 1, 2010 the employing establishment informed OWCP that, after speaking with human resources at the Veterans Administration (VA) Southern Nevada Healthcare System clinic, it was determined that there were no local positions available that fit appellant's skill set at the GS-3 level. The offered position remained available in Los Angeles.

By letter dated June 16, 2010, OWCP advised appellant that the position offered was found suitable. Appellant was notified that, if he failed to report to work or failed to demonstrate that the failure was justified, pursuant to section 8106(c)(2) of FECA, his right to compensation for wage loss or a schedule award would be terminated. He was given 30 days to respond. On July 9, 2010 appellant's former attorney responded that appellant was not in a position to accept the offered position, stating, "although the duties and physical limitations of the offered position as described [are] acceptable but the location of the proposed position is not acceptable," noting that he was a resident of Nevada and could not travel more than 600 miles each day.[5] On August 2, 2010 OWCP advised him that his reasons for refusing the offered position were not valid and he was given an additional 15 days to accept.

By decision dated September 1, 2010, it terminated appellant's compensation benefits on the grounds that he refused to accept an offer of suitable work. OWCP noted that the employing establishment attempted to locate available work in Nevada but no positions were available that fit his skill set.

On September 28, 2010 appellant requested reconsideration. In an October 16, 2010 work capacity evaluation, Dr. Ted Leon, an osteopath, advised that he could not work eight hours a day due to increasing and disabling right foot pain. Dr. Leon stated that appellant could work sitting for four hours daily, with further restrictions that he could stand less than one hour, could operate a motor vehicle for one hour and could not walk, bend, push, pull, lift, squat, kneel

[5] At that time appellant was represented by Geraldine Kirk-Hughes, Esq.

or climb. He also noted that appellant was taking medications that could cause drowsiness. A September 11, 2010 limited bone scan with attention to bilateral feet and ankles demonstrated mild generalized increased uptake which was probably degenerative and increased uptake in the distal right lateral tibia or fibula. In an October 19, 2010 work capacity evaluation, Dr. Leon advised that appellant could not work for eight hours a day due to cervical radiculopathy and right foot and ankle degenerative disease causing severe disabling pain. He provided restrictions of 30 minutes operating a motor vehicle; 10 minutes of pushing 25 pounds; 10 minutes of lifting 5 to 10 pounds; 10 minutes of squatting and kneeling and no sitting, walking, standing, reaching, bending, pulling or climbing.

On November 16, 2010 the employing establishment reiterated that it had contacted the VA Southern Nevada Healthcare System and no positions were available.

In a merit decision dated January 6, 2011, OWCP denied modification of the September 1, 2010 decision.

LEGAL PRECEDENT

Section 8106(c) 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."[6] It is OWCP's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[7] The implementing regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.[8] To justify termination, OWCP must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[9] In determining what constitutes "suitable work" for a particular disabled employee, OWCP 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.[10] 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 medical evidence.[11]

[6] 5 U.S.C. § 8106(c).

[7] *Joyce M. Doll*, 53 ECAB 790 (2002).

[8] 20 C.F.R. § 10.517(a).

[9] *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[10] 20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB 681 (2004).

[11] *Gayle Harris*, 52 ECAB 319 (2001).

OWCP procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.[12]

OWCP regulations provide that the employer, if possible, should offer suitable reemployment in the location where the employee currently resides. If this is not practical, the employer may offer suitable reemployment at the employee's former duty station or other location.[13] A preference for the area in which a claimant resides is not an acceptable reason for refusing an offered position.[14]

ANALYSIS

Appellant contended that OWCP did not properly determine if a position was available in the Las Vegas area. As noted, OWCP regulations provide that the employer, if possible, should offer suitable reemployment in the location where the employee currently resides.[15] In this case, OWCP contacted the employing establishment in the Nevada region and was informed that there were no positions available that fit appellant's restrictions or skill set. It was therefore permissible for the employing establishment to offer appellant reemployment at his former duty station.[16] Appellant's preference for only considering positions in Las Vegas where he resided was not an acceptable reason for refusing an offered position.[17]

The Board finds that OWCP met its burden of proof in terminating appellant's wage-loss compensation on the grounds that he refused an offer of suitable work. The accepted conditions in this case are contusion of the right foot and ankle, exostosis of the right foot and mononeuritis of the right lower extremity. OWCP based its September 1, 2010 termination on Dr. Swartz' December 14, 2009 report. Dr. Swartz examined appellant and found that he could return to a light-work position for eight hours a day. The physical requirements of the offered receptionist position comported with the physical requirements provided by Dr. Swartz in a December 23, 2009 work capacity evaluation and vocational testing demonstrated that appellant could perform the duties. When the position was offered on March 23, 2010, the medical evidence established that appellant could perform the duties of the offered position. Appellant had submitted no medical evidence since an August 10, 2005 report from Dr. Weiner, an attending podiatrist.

Appellant refused the offered position and submitted additional medical evidence including a December 12, 2009 MRI scan study of the cervical spine that demonstrated a

[12] Federal (FECA) Procedure Manual, Part -- 2 Claims, *Reemployment: Determining Wage-Earning Capacity, Refusal of Job Offer*, Chapter 2.814.5.a(1) (July 1997); *see Lorraine C. Hall*, 51 ECAB 477 (2000).

[13] 20 C.F.R. § 10.508; *Sharon L. Dean*, 56 ECAB 175 (2004).

[14] *E.H.*, Docket No. 08-1862 (issued July 8, 2009).

[15] *Supra* note 13.

[16] *Id*.

[17] *E.H.*, *supra* note 14. Regarding appellant's argument that the offered position was not a proper grade, OWCP procedures provide the framework for offers of reemployment. *Supra* note 12. There is nothing in the record to show that the procedures were not followed.

congenital defect and multilevel degenerative disc disease, annular tears and mild neural foraminal stenosis. As a diagnostic test, the MRI scan did not contain any review of the duties of the job offer or a physician's opinion addressing whether appellant was disabled from performing the sedentary work offered in this case. There is no opinion of record by a physician that addresses any disability for work due to a cervical condition.

In an April 12, 2010 treatment note, Dr. Minev, an attending internist, provided physical examination findings and diagnosed chronic neck sprain/strain, a right rotator cuff repair in 2009, lumbar degenerative disc disease, chronic hepatitis C, resection for renal cell carcinoma in April 2007, dyspnea and continued severe pain of the right foot. He primarily addressed appellant's right foot pain and a neuroma. Dr. Minev provided no opinion addressing the sedentary job offer or any opinion that appellant was disabled from performing the duties of the offered position due to the diagnosed conditions. OWCP procedures require that there be medical evidence documenting that a condition renders a claimant disabled from the offered job before OWCP must consider the condition in reaching a suitable work determination.[18] The Board finds that the weight of the medical evidence rests with the opinion of Dr. Swartz and supports that appellant could perform the duties of the position offered on March 23, 2010.

There is also no evidence of any procedural defect in this case as OWCP provided appellant with proper notice. Appellant was offered a suitable position by the employing establishment and the offer was refused. Thus, under section 8106(c) of FECA, his monetary compensation was properly terminated on September 1, 2010 on the grounds that he refused an offer of suitable employment.[19]

After OWCP established that the offered work was suitable, the burden shifted to appellant to show that his refusal was reasonable or justified.[20] The September 11, 2010 bone scan examination is a diagnostic test, and as noted, did not contain any review of the duties of the job offer or a physician's opinion addressing whether appellant was disabled from performing the sedentary work offered in this case. In his October 16 and 29, 2010 work capacity evaluations, Dr. Leon exhibited no knowledge of the offered position and provided no opinion on appellant's capacity to perform work as a modified-duty information receptionist. He generally indicated that appellant had cervical radiculopathy and increased right foot and ankle pain and could only work four hours a day. Appellant submitted insufficient medical evidence to establish that his refusal of the suitable position was medically justified.

Appellant may submit new evidence or argument with a written request for reconsideration with OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

[18] *Karen Y. Yaeger*, 54 ECAB 323 (2003).

[19] *Joyce M. Doll*, *supra* note 7.

[20] *M.S.*, 58 ECAB 328 (2007).

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation on September 1, 2010 pursuant to section 8106(c) of FECA. Appellant did not, thereafter, establish that his refusal of suitable work was justified.

ORDER

IT IS HEREBY ORDERED THAT the January 6, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 14, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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