United States Department of Labor
Employees' Compensation Appeals Board

P.S., Appellant	)	
and	)	**Docket No. 12-117**
	)	**Issued: September 11, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Islandia, NY, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 21, 2011 appellant, through his attorney, filed a timely appeal from a September 14, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 met its burden of proof to terminate appellant's wage-loss compensation benefits effective May 8, 2011 on the grounds that he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

On appeal, appellant's counsel contends that OWCP's decision was contrary to fact and law.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 18, 2002 appellant, then a 47-year-old modified clerk, filed a recurrence claim alleging that on November 15, 2002 he sustained a recurrence of an October 18, 2002 work-related back injury.[2] He stopped work on November 16, 2002. The recurrence claim was converted into a new traumatic injury claim and was accepted for lumbar subluxation. Appellant was placed on the periodic rolls.

On April 27, 2009 OWCP referred appellant to Dr. Edwin Mohler, a Board-certified orthopedic surgeon, for a second-opinion examination. In a May 28, 2009 report, Dr. Mohler reviewed appellant's medical history, including the statement of facts and provided an accurate history of injury. He opined that appellant still suffered from disabling residuals from the initial traumatic work injury and recurrence. Dr. Mohler explained that appellant's symptoms had not resolved as he was not performing the reconditioning of his core musculature nor moving those joints in a physiological manner. He reported that appellant was capable of working eight hours, but not in the position as a postal clerk until he successfully reconditioned himself in order to do so. Dr. Mohler advised appellant to avoid twisting with his feet planted, repetitive bending, pushing more than 60 pounds, pulling more than 50 pounds and lifting more than 25 pounds. He reported that if appellant's reconditioning efforts were successful, these restrictions would be temporary. Dr. Mohler also did not recommend further treatment by a health care provider since appellant reached maximum medical improvement on September 15, 2003.

On June 9, 2009 OWCP referred appellant to Dr. Patrick Hughes, a Board-certified neurologist, for a second-opinion examination. In a June 24, 2009 report, Dr. Hughes provided an accurate history of injury and noted that appellant had been out of work since the November 2002 injury. Upon examination, he observed that appellant's strength was normal in the deltoid, biceps, triceps, infraspinatu, brachoradialis, extensor carpi radialis, extensor carpi ulnaris, extensor dugitorum and interossel muscles. Straight leg raise testing was negative in both legs. Dr. Hughes diagnosed chronic low back pain on the basis of musculoligementous strain and reported that there were no objective findings of any compensable conditions. He stated that appellant's conditions had not resolved and that he had been left with chronic low back pain, together with tingling and numbness going down the back of the left leg. Dr. Hughes opined that appellant was capable of working part time and could sit, stand, walk and drive for an hour and lift only up to 10 pounds. He stated that these restrictions were permanent and that appellant reached maximum medical improvement in February 2003.

In a June 24, 2009 work capacity evaluation, Dr. Hughes limited appellant to sitting, walking, standing, operating a motor vehicle and reaching for six hours, reaching above the shoulder, twisting, bending and stooping for one hour, pushing and pulling up to 20 pounds and lifting up to 10 pounds.

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[2] OWCP previously accepted that on October 18, 2001 appellant sustained a dislocation of lumbar vertebra as a result of lifting packages and twisting at work. Appellant's claim was accepted for low back pain. He returned to light duty.

On July 14, 2009 OWCP requested that the employing establishment provide appellant with a job within the restrictions provided in Dr. Mohler and Dr. Hughes' second-opinion reports.

On September 21, 2010 the employing establishment offered appellant a modified window clerk position in Massapequa, New York beginning September 21, 2010. Appellant would work six hours, Monday through Wednesday and Friday through Saturday from 11:30 a.m. to 5:30 p.m. His duties involved casing mail up to one hour and window clerk functions up to six hours. The physical requirements included picking up letters and reaching above the shoulders for items weighing less than 20 pounds, standing while throwing mail and casing route up to one hour and delivering express mail and parcels and operating a motor vehicle up to three hours.

By letter dated September 20, 2010, OWCP advised appellant that the modified window clerk assignment had been found to be suitable and conformed to the work limitations provided by Dr. Mohler. It requested appellant respond to the proposed job offer by September 28, 2010 and advised him that, pursuant to 5 U.S.C. § 8106(c)(2), an employee who refuses an offer of suitable work without reasonable cause is not entitled to compensation.

On September 24, 2010 appellant declined the modified window clerk position and submitted a June 24, 2009 work capacity evaluation with an illegible signature. It noted that he was capable of sitting, walking, standing, reaching and operating a motor vehicle for six hours, twisting, bending, stooping and reaching above the shoulders for one hour, pushing and pulling up to 10 pounds and lifting up to 10 pounds.

On October 20, 2010 OWCP advised the employing establishment that because Dr. Mohler's May 28, 2009 second opinion report was more than a year old, the September 21, 2010 job offer was not suitable at this time. It informed the employing establishment that appellant was being referred for another second-opinion examination.

On October 26, 2010 OWCP again referred appellant to Dr. Mohler for a second-opinion examination. In a December 15, 2010 report, Dr. Mohler reviewed appellant's history and current complaints. In response to OWCP's question: "If there is a disability, is it solely due to the employment[-]related injury? Are there any other nonwork factors or incidents the claimant is suffering from that may prevent him from returning to full-duty work? This includes conditions other than the condition accepted in this claim. Please explain your answer." Dr. Mohler responded:

> "[Appellant's] present disability is not solely due to the employment[-]related injury. Other nonwork factors are the motor vehicle accidents in 1999 or 2000, motor vehicle accident in July 2005 and whether or not he actually had surgery on his left lower extremity. All are yet to be determined whether they are preventing [appellant] from returning to full-duty work. If the motor vehicle accident in 1999 or 2000, only resulted in right shoulder injury and surgery and no surgery on his left lower extremity, then this is not a factor in his present condition. If the auto accident in July 2005 did not affect [appellant's] lumbosacral spine or left lower extremity, then this too is not a factor involved in his present condition.

> [Appellant's] present condition is a result of lack of his own motivation and efforts to recondition his lumbosacral spine and lower extremities, as well as to resolve his muscle spasm, his decreased range of motion and his symptomatology."

Dr. Mohler recommended that appellant's medical records dating back to 1999 be submitted for review by an independent medical evaluator to determine whether the disabling residuals of low back pain syndrome were solely related to the October 2001 and November 2002 work-related injuries.

By letter dated January 31, 2011, OWCP advised appellant that the modified part-time flexible letter carrier position had been found to be suitable to his work capabilities. It determined that the weight of the medical evidence rested with the two independent medical examinations and not with his chiropractor. The employing establishment confirmed that the position remained available. OWCP allowed appellant 30 days to accept the position or provide his reasons for refusal. It advised that, pursuant to 5 U.S.C. § 8106(c)(2), an employee who refuses an offer of suitable work without reasonable cause is not entitled to compensation.

Appellant submitted a February 14, 2011 report cosigned by a nurse practitioner and Dr. Jorgensen, who diagnosed chronic low back pain and left lower limb pain and degenerative change at the L5-S1 without evidence of herniation. Dr. Jorgensen stated that appellant continued to experience chronic low back pain and intermittent left lower limb pain as a result of a 2002 work injury. The pain worsened with repetitive bending, twisting, lifting and prolonged standing. Appellant related that he was offered a part-time position as a clerk working six hours a day. His duties would include picking up letters, reaching at or above the shoulder level up to one hour per day for parcels less than 20 pounds and standing while throwing mail up to one hour at a time. Dr. Jorgensen concluded that appellant remained permanently partially disabled to a moderate degree.

By letter dated March 8, 2011, OWCP advised appellant that his reasons for refusing the offered position were not determined to be reasonable. It advised that his wage-loss and schedule award benefits would be terminated if he did not accept the position within 15 days.

On April 18, 2011 OWCP confirmed that appellant had not accepted the modified window clerk position and that the job was still available.

By decision dated April 21, 2011, OWCP terminated appellant's entitlement to wage-loss compensation, effective May 8, 2011, on the basis that he refused an offer of suitable work.

On April 27, 2011 appellant, through counsel, disagreed with the decision and requested a hearing, which was held on July 26, 2011. At the hearing, appellant was represented by attorneys Alan J. Shapiro and Mary Ann Rini. He stated that prior to his November 2002 injury he worked full time at the North Massapequa postal facility and confirmed that the job position offered was part time at the Massapequa facility. Appellant noted that he currently lived in Brant Lake, NY, which was within 400 miles and explained that it would be a financial hardship to relocate to Massapequa because his wife had a very good job in Brant Lake. He also refused the modified job offer because his physicians stated that he was not capable of doing any kind of

work. Appellant's representative also pointed out that the modified-duty position was not posted for a bid.

In a letter dated August 11, 2011, the employing establishment provided its response to the hearing transcript. It pointed out that under OWCP regulations, the search for work begins with the employee's date-of-injury position, but if no suitable work was found then the search was expanded to other work tours. The employing establishment noted that appellant created the financial hardship by moving to Brant Lake, NY and explained that a limited-duty job offer was an assignment and not a bid.

By decision dated September 14, 2011, OWCP denied modification of the April 21, 2011 termination decision. It found that the job offer was reasonable as OWCP regulations provide that the employing establishment may offer suitable reemployment at the employee's former duty station or other location. OWCP also stated that the medical evidence, including the reports from appellant's treating physicians, supported appellant's ability to return to work and demonstrated that the offered job was within his restrictions.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation it has the burden of justifying termination or modification of an employee's benefits.[3] This includes cases in which OWCP terminates compensation under section 8106(c)(2) of FECA for refusal to accept suitable work.

Section 8106(c)(2) of FECA states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for him is not entitled to compensation.[4] OWCP has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when offered. Before compensation can be terminated, however, OWCP has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.[5]

With regards to relocation, 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.[6]

OWCP regulations further provide that an employee, who refused to work after suitable work had been offered to or secured for the employee, has the burden of showing that such

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[3] *S.F.,* 59 ECAB 642 (2008); *Kelly Y. Simpson,* 57 ECAB 197 (2005); *Paul L. Stewart,* 54 ECAB 824 (2003).

[4] 5 U.S.C. § 8106(c)(2).

[5] *See M.L.,* 57 ECAB 746, 750 (2006). *See also Frank J. Sell, Jr.*, 34 ECAB 547, 552 (1983).

[6] 20 C.F.R. § 10.508.

refusal or failure to work was reasonable or justified.[7] The employee shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.[8]

ANALYSIS

OWCP accepted appellant's claim for lumbar subluxation and paid compensation and medical benefits. It referred him for second-opinion examinations and found him able to return to modified duty. On September 21, 2010 the employing establishment offered appellant a position as a modified window clerk based on the limitations set by the second-opinion examinations of Drs. Mohler and Hughes. OWCP found that this position was suitable, provided proper notice and terminated his compensation effective May 8, 2011 due to his failure to accept suitable employment. The Board finds that OWCP erred in terminating appellant's compensation because the evidence does not demonstrate that the modified window clerk position was suitable.

OWCP requested that the employing establishment provide appellant with a job within the restrictions provided in Dr. Mohler's May 28, 2009 and Dr. Hughes' June 24, 2009 second-opinion examination reports. On September 21, 2010 the employing establishment offered him a modified window-clerk position based on these limitations. By letter dated October 20, 2010, OWCP advised the employing establishment that because Dr. Mohler's May 28, 2009 second-opinion report was more than a year old, the September 21, 2010 job offer was not suitable at this time and referred appellant to another second-opinion examination. In a December 15, 2010 second-opinion examination report, Dr. Mohler stated that appellant continued to suffer disabling residuals of his accepted back condition, but he was not sure whether his current back condition was a sole result of the November 2002 injury. He indicated that appellant might have other medical conditions resulting from motor vehicle accidents in 1999 or 2000 and July 2005 but "all are yet to be determined whether they are preventing him from returning to full-duty work." Dr. Mohler recommended that appellant's claim be referred to an independent medical examiner to determine whether a 1999 or 2000 and July 2005 motor vehicle accident aggravated his back condition.

OWCP did not, however, seek an independent medical examination as recommended by Dr. Mohler, nor did OWCP recognize that he in fact reported that appellant's current disability status required clarification because the nature of his disability due to the nonwork-related events was at issue. It is well established that OWCP must consider preexisting and subsequently acquired conditions in the evaluation of suitability of the offered position.[9] As a penalty provision, 5 U.S.C. § 8106(c) should be narrowly construed. Since Dr. Mohler stated that he could determine appellant's disability status, without further evaluation of his nonwork-related injuries, OWCP did not meet its burden of proof to establish that the offered position was suitable work.

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[7] *Id.* at § 10.517(a); *see Ronald M. Jones,* 52 ECAB 190 (2000).

[8] *Id.* at § 10.516; *see Kathy E. Murray,* 55 ECAB 288 (2004).

[9] *S.H.*, Docket No. 10-1531 (issued April 13, 2011); *Richard P. Cortes*, 56 ECAB 200 (2004).

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation because it did not demonstrate that the work offered to and refused or neglected by appellant was medically suitable.

Under the circumstances of his case, OWCP did not properly find that he refused suitable work. Thus, the Board will reverse OWCP's September 15, 2011 decision.

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation benefits effective May 8, 2011 on the grounds that he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the September 14, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 11, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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