United States Department of Labor
Employees' Compensation Appeals Board

RONALD T. SMITH, Appellant	)	
and	)	**Docket No. 03-812**
	)	**Issued: August 25, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Manchester, NH, Employer	)	

Appearances:
Ronald T. Smith, pro se
Miriam D. Ozur, for the Director

Oral Argument July 15, 2004

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On February 6, 2003 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated February 21, 2002 which terminated his compensation benefits for refusal of suitable work. Under 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 the Office properly terminated appellant's compensation benefits on the grounds that he refused an offer of suitable work.

FACTUAL HISTORY

On November 10, 1994 appellant, a 28-year-old mail handler, injured his lower back while reaching to steady a piece of machinery. He filed a claim for benefits on the date of injury. Appellant filed five more claims for traumatic injury to his back: August 11, 1995, February 21 and June 9, 1996 and February 6 and July 7, 1997. The Office accepted claims for mid back

strain, low back strain and herniated thoracic disc. Appellant received compensation for total disability and was placed on the periodic rolls.

In a report dated May 27, 1998, Dr. George F. May, a specialist in orthopedic surgery and the attending physician, stated that appellant was considered totally and permanently disabled with no chance of recovery without spinal surgery.

In a work capacity evaluation dated November 11, 1998, Dr. May stated that appellant was considered totally disabled due to thoracic and lumbar disc ruptures.

In order to determine appellant's current condition and whether he was capable of returning to gainful employment, the Office referred appellant for a second opinion examination with Dr. Donald Pearson, a Board-certified orthopedic surgeon. In a report dated April 26, 1999, Dr. Pearson stated that he saw no reason why appellant should not work at his usual job as mail handler for eight hours without restrictions. He advised that there were no objective findings to warrant surgery and felt that the objective findings were not consistent with appellant's subject complaints during examination.

The Office found that there was a conflict in the medical evidence between Dr. May, the attending physician and Dr. Pearson, the referral physician, regarding whether appellant was still totally disabled due to his accepted low back condition and it therefore referred appellant, together with a statement of accepted facts and the case record, to Dr. Michael J. Broom, a Board-certified orthopedic surgeon, for an impartial medical evaluation. In a report dated June 4 1999, Dr. Broom indicated that appellant was capable of performing his usual job as a mail handler with restrictions on bending and twisting of the back and trunk, lifting more than 10 to 15 pounds and squatting and climbing. He also opined that appellant should be allowed breaks from prolonged standing and walking.

In a supplemental report dated July 29, 1999, Dr. Broom stated:

> "When I saw [appellant], he indicated to me he began having upper back pain in the thoracic area along with reading chest wall pain, within several days of his injury. It was for this reason, that I related the thoracic disc lesion to the injury. Certainly, the lumbar sprain should have resolved and left him with no residuals. I would feel that the work restrictions I applied, which were due to the objective findings, were related to his reported injury. I do n[o]t feel [appellant] is 100 percent disabled and I feel he could work with limitations.

In a work capacity evaluation dated February 22, 2000, Dr. Broom indicated that appellant could work an eight-hour day, with restrictions which included walking and standing for no more than one to two hours, one hour of twisting, two hours of pushing and pulling not exceeding 30 pounds and one hour of lifting not exceeding 15 pounds.

On March 20, 2000 the employing establishment offered appellant a job as a modified mail handler based on the restrictions outlined by Dr. Broom. The job description stated that none of the duties involved bending, twisting or prolonged use of the arms in an outstretched position; no squatting, kneeling or climbing; no pushing or pulling, no lifting over 15 pounds intermittently; and no twisting for no more than one hour. The job offer also noted that the

duties of the position could be rotated to accommodate appellant's physical needs and physician's lists of limitations. Appellant rejected the offer on April 7, 2000.

In a September 20, 2000 report, Dr. Broom reiterated that appellant should avoid excessive twisting activities. In an amended work capacity evaluation dated November 22, 2000, Dr. Broom specifically indicated that appellant should limit his twisting to no more than one to two hours. He also indicated that appellant could engage in pushing and pulling for 8 hours, not exceeding 50 pounds.

By letter dated February 5, 2001, the Office advised appellant that a suitable position was available and that pursuant to section 8106(c)(2), he had 30 days to either accept the job or provide a reasonable, acceptable explanation for refusing the offer. The Office advised appellant that it would be terminating his compensation based on his refusal to accept a suitable position which reflected his ability to work as a modified mail handler for eight hours per day. The Office noted that as of that date, appellant had not responded to the employing establishment's offer. The Office stated that if appellant refused the job or failed to report to work within 30 days without reasonable cause, it would terminate his compensation pursuant to 5 U.S.C. § 8106(c)(2).[1]

By letter dated March 15, 2001, appellant rejected the job offer on the grounds that his treating physician, Dr. Mandel B. Miller, a Board-certified family practitioner, believed it was not in accordance with his physical restrictions. In a report dated March 6, 2001, Dr. Miller stated that appellant would not be able to perform the duties of the offered position because of his inability to perform activities involving reaching, grabbing or lifting with his upper extremities.

By letter dated March 22, 2001, the Office advised appellant that he had 15 days in which to accept the position or it would terminate his compensation. Appellant did not respond within 15 days.

By decision dated April 10, 2001, the Office terminated appellant's compensation benefits on the grounds that he refused an offer of suitable work.

By letter dated May 10, 2001, appellant requested an oral hearing, which was held on December 7, 2001. Appellant submitted a November 29, 2001 report from Dr. Miller, who noted appellant's complaints of chronic pain and stated that findings from a magnetic resonance imaging (MRI) scan indicated extruded L4-5 disc causing spinal stenosis. Dr. Miller recommended that appellant see a neurosurgeon for evaluation and treatment.

By decision dated February 21, 2002, an Office hearing representative affirmed the April 10, 2001 termination decision.

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[1] 5 U.S.C. § 8106(c)(2).

LEGAL PRECEDENT

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits. Under section 8106(c)(2) of the Federal Employees' Compensation Act[2] the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[3] Section 10.517 of the Office's regulation provides that an employee who refuses or neglects to work after suitable work has been offered or secured 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 a determination is made with respect to termination of entitlement to compensation.[4] To justify termination, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[5] This burden of proof is applicable if the Office terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work.

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[6]

ANALYSIS

In the present case, the Office properly determined that a conflict existed in the medical opinion evidence between appellant's treating physician, Dr. May and the Office's second opinion physician, Dr. Pearson, regarding appellant's ability to return to work. The Office therefore properly referred appellant to Dr. Broom for an impartial medical evaluation to resolve the issue of appellant's ability to return to work activity. Based upon Dr. Broom's reports the employing establishment offered appellant a modified mailhandler position, which the Office determined was suitable work.

The determination 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 the medical evidence.[7] In the instant case, the employing establishment located a job as a modified mailhandler for eight hours per day, which was specifically crafted around the physical restrictions Dr. Broom, the impartial medical examiner, approved as suitable for appellant. The Office found that the weight of the medical evidence rested with Dr. Broom's opinion. Dr. Broom explained that while appellant's accepted lumbar strain had resolved, based

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[2] 5 U.S.C. § 8101 *et. seq*.

[3] *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987).

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

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

[6] *Solomon Polen,* 51 ECAB 341 (2000).

[7] *Robert Dickinson,* 46 ECAB 1002 (1995).

upon the lack of objective findings on examination, the physical examination did reveal objective findings of thoracic disc lesion which was also caused by the work injury. Dr. Broom therefore concluded that appellant was not totally disabled, but that appellant was capable of performing the modified job and returning to work within the indicated restrictions of limited use of the arms in an outstretched position, lifting, twisting, pushing, pulling, bending, squatting, kneeling and climbing. This decision was proper, as Dr. Broom's opinion, as that of an impartial medical examiner, represented the weight of medical opinion at the time of the Office's termination decision.[8]

Once the Office establishes that the work offered was suitable, the burden shifts to the employee who refused to work to show that such a refusal was justified.[9]

Following the Office's termination of compensation, appellant submitted the November 29, 2001 report from Dr. Miller, whose summary report, however, did not contain countervailing, probative medical evidence that appellant was unable to perform the modified job as of the date of the termination of benefits. Dr. Miller merely stated findings from an MRI scan and recommended that appellant see a neurosurgeon for evaluation and treatment. He provided no opinion as to whether appellant was capable of performing the modified position. Thus, Dr. Miller's report did not satisfy appellant's burden of proof to submit medical evidence sufficient to warrant modification of the Office's April 10, 2001 termination decision. Accordingly, the Board affirms the Office's February 21, 2002 decision, affirming the April 10, 2001 termination decision.

CONCLUSION

The Board finds that the Office met its burden to terminate appellant's compensation benefits pursuant to 5 U.S.C. § 8106.

[8] *Barbara R. Bryant*, 47 ECAB 715 (1996).

[9] *Catherine G. Hammond,* 41 ECAB 375 (1990).

ORDER

IT IS HEREBY ORDERED THAT the February 21, 2002 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: August 25, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member