United States Department of Labor
Employees' Compensation Appeals Board

RAY KONN, Appellant	)	
and	)	**Docket No. 03-2147**
	)	**Issued: August 10, 2004**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Wilkes Barre, PA, Employer	)	

Appearances:
Malcolm M. Limongelli, Esq., for the appellant
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On September 3, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated April 15 and August 15, 2003, which terminated his compensation. Under 20 C.F.R. §§ 501(c) and 501.3 and the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office met its burden of proof to terminate appellant's compensation benefits effective December 2, 2001 on the grounds that he refused an offer of suitable work.

FACTUAL HISTORY

On December 2, 1997 appellant, a 50-year-old program clerk, injured his lower back while transferring medical records from carts to shelves. He filed a claim for benefits on December 3, 1997 which the Office accepted for cervical and lumbar strains. The Office paid appellant compensation for temporary total disability and placed him on the periodic rolls.

In a report dated January 29, 1998, Dr. Victor T. Ambruso, an attending Board-certified neurosurgeon, stated that appellant had a chronic lumbar radiculopathy which probably was exacerbated by his recent injury, cervical radiculopathy resulting from degenerative changes aggravated by his recent injury, left carpal tunnel syndrome and left ulnar neuropathy. Dr. Ambruso recommended anterior cervical discectomy and fusion at the C5-6 level to remedy the cervical radiculopathy and carpal decompression in his left hand. He stated that appellant was unable to work.

In a report dated April 20, 1998, Dr. Peter A. Feinstein, a Board-certified orthopedic surgeon who served as an Office referral physician, stated that, although appellant's physical examination confirmed the presence of a cervical radiculopathy, his magnetic resonance imaging (MRI) scan results did not warrant a recommendation for surgery. He indicated that the diagnosis of carpal tunnel syndrome had not been confirmed and recommended that appellant undergo a myelogram and computerized axial tomography (CAT) scan of the cervical spine in order to obtain a more definitive diagnosis prior to undergoing such surgery. In a May 4, 1998 report, he provided a similar opinion regarding the need for additional testing before establishing the necessity for surgery.

In a report dated May 19, 1998, Dr. Ambruso noted the results of an MRI scan appellant underwent on his cervical spine and again recommended an anterior cervical discectomy and fusion at the C5-6 level. He opined that obtaining a myelogram and CAT scan would be unnecessary and indicated that appellant had employment-related carpal tunnel syndrome.

On August 3, 1998 in order to resolve the conflict in medical evidence between Dr. Ambruso and Dr. Feinstein regarding whether appellant required cervical surgery for an employment-related condition, the Office referred him to Dr. Joseph R. Sgarlat, a Board-certified orthopedic surgeon, for an impartial medical examination.[1] In a report dated August 24, 1998, Dr. Sgarlat stated that he did not see any convincing evidence of the need for cervical surgery.[2] He further noted that appellant had mild degenerative disc changes in his neck and moderate degenerative disc changes in his low back which were not employment related. Dr. Sgarlat indicated that he saw no evidence of carpal tunnel syndrome and noted that appellant's cervical and lumbar disc disease and the unrelated functional loss of his right hand would not prevent him from working. He completed a form which detailed appellant's work restrictions, including reaching, lifting, pushing or pulling for no more than two hours and walking or standing for no more than five hours.

Based on Dr. Sgarlat's opinion, the Office denied authorization for cervical surgery.[3] In a February 1, 2001 memorandum, the Office indicated that the referee opinion of Dr. Sgarlat represented one side of a conflict in medical opinion regarding whether appellant's current condition was causally related to his December 2, 1997 employment injury and whether he had any employment-related disability. The Office noted that Dr. Sgarlat's opinion on causal

[1] The Office also asked Dr. Sgarlat to provide a diagnosis of appellant's condition, to indicate whether any diagnosed condition was related to employment factors and to determine whether he had any disability.

[2] Dr. Sgarlat also opined that appellant did not require surgery for the lumbar spine or for carpal tunnel release.

[3] It is unclear from the record whether the Office issued a formal decision concerning this matter.

relationship conflicted with those rendered by appellant's "treating physicians." Therefore, the Office referred him for an impartial medical examination with Dr. David R. Cooper, a Board-certified orthopedic surgeon, to determine whether appellant still suffered from residuals of his employment injury and, if so, the degree and extent of any remaining disability.

In a report dated April 25, 2001, Dr. Cooper stated that appellant had cervical disc disease, cervical radiculopathy and lumbar degenerative disc disease aggravated by the work injury. He also ruled out any work-related carpal tunnel syndrome. Dr. Cooper advised that appellant could perform a very sedentary type of job, but would have to frequently change positions. He further stated that, in light of the fact that appellant has been on disability for so long, he believed attempts to place him in a job would be fruitless. In an April 25, 2001 work restriction evaluation, Dr. Cooper indicated that appellant could work a 4-hour day with restrictions of no more than 1 hour of sitting and no more than 15 minutes of each of the following activities: walking, standing, pushing, pulling, lifting, squatting, kneeling, climbing, reaching, twisting and engaging in repetitive wrist or elbow motions. He also limited him from pushing, pulling, lifting, squatting, kneeling and climbing with more than five pounds.

Appellant submitted a September 20, 2001 report of Dr. Ambruso and an August 27, 2001 report of Mark W. Bohn, an attending Board-certified orthopedic surgeon. Dr. Ambruso indicated in his September 20, 2001 report, that appellant was unable to work in any capacity, that his problems were permanent and that he would never work again. In his August 27, 2001 report, Dr. Bohn stated that appellant had experienced severe arthritis in both knees since 1991 and that he had degenerative changes in his back, neck and left upper extremity. He advised that appellant's orthopedic problems were permanent and would only deteriorate with time. Dr. Bohn concluded that his ability to perform any gainful employment was "realistically zero."

The Office referred appellant to a vocational rehabilitation counselor, who was asked to locate a suitable job within the restrictions outlined by Dr. Cooper. By letter dated October 1, 2001, the employing establishment offered appellant a job as a file clerk. The job would require him to work for 4 hours per day, 20 hours per week, at the employing establishment, where he previously was employed. The duties of the job included compiling and filing medical records, preparing folders and maintaining records, delivering medical records requested by hospital departments, compiling statistical data, operating a computer and photocopying and typing correspondence and reports. The position description indicated that appellant would not be required to walk, stand, sit, bend, reach, push or pull for more than 15 minutes at a time without changing positions and would not be required to lift more than 5 pounds.

By letter dated October 16, 2001, the Office advised appellant that the file clerk position was within the restrictions outlined by Dr. Cooper and, therefore, was suitable. The Office informed him that he had 30 days to either accept the job or provide reasons which justified his refusal of the job.

On October 19, 2001 appellant declined the job offered by the employing establishment. In an undated handwritten letter, he stated that he experienced constant pain from his employment-related neck injury which affected his eyesight, speech and vision and caused dizziness. He stated that his neck pain radiated left upper extremity, which was now almost dysfunctional and asserted that his right arm was nearly "amputated." Appellant further stated

that he also experienced employment-related pain in his low back and that he took three different types of medication which affected his mental state. He asserted that the offered job was essentially the same job he had at the time of his injury.

Appellant then submitted September 20 and 26, 2001 reports of Dr. Ambruso. In his September 20, 2001 report, Dr. Ambruso indicated that on examination appellant was unable to bend forward more than a few degrees and, while he had some sensation in his right hand, it was basically useless due to a previous injury. In his September 26, 2001 report, he stated that appellant's current condition was the same or worse than his condition in 1998 and noted that because of his cervical and lumbar radiculopathies he was unable to work in any capacity. Dr. Ambruso also indicated that appellant's medications would diminish his reaction time, reflexes and his ability to think.

By letter dated October 26, 2001, the Office again advised appellant that the file clerk job was suitable and that he had 15 days to either accept the job or provide reasons which justified his refusal to accept the job. By decision dated November 21, 2001, the Office terminated appellant's compensation benefits effective December 2, 2001, on the grounds that he refused an offer of suitable work. The Office indicated that the opinion of Dr. Cooper, the impartial medical examiner, showed that the file clerk job was suitable.

By letter dated December 4, 2001, appellant requested a hearing before an Office hearing representative which was held on January 7, 2003. He submitted a January 24, 2003 report from Dr. Bohn and a January 30, 2003 report from Dr. Ambruso. In his January 24, 2003 report, Dr. Bohn stated that appellant still suffered from chronic back pain and neck pain which radiated to both legs. He reiterated that his orthopedic problems were permanent, would only deteriorate with time and that he had zero percent ability to perform any gainful employment. In his January 30, 2003 report, Dr. Ambruso advised that appellant had limited range of motion of his neck and waist, that he had diffuse hypalgesia of both upper extremities with minimal media nerve function on the right and that he had trouble with heel and toe walking. He concluded that appellant could not work in any capacity.

By decision dated and finalized April 15, 2003, the Office hearing representative affirmed the Office's November 21, 2001 decision. Appellant submitted a June 20, 2003 report of Dr. Bohn, which was similar to his January 24, 2003 report. By decision dated August 15, 2003, the Office affirmed the April 15, 2003 decision.

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees' Compensation Act 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."[4] However, to justify such termination, the Office must show that the work offered was suitable.[5] An employee who refuses or neglects to work

[4] 5 U.S.C. § 8106(c)(2).

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

after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[6]

ANALYSIS

In the present case, the Office terminated appellant's compensation effective December 2, 2001, on the grounds that he refused an offer of suitable work which was made by the employing establishment in October 2001. The Office based its determination that the file clerk position offered to appellant was suitable on the April 25, 2001 report of Dr. Cooper, a Board-certified orthopedic surgeon, to whom he was referred for an impartial medical examination. However, at the time the conflict in the medical evidence was declared in February 2001, there was no actual conflict in the medical evidence regarding appellant's ability to work around that time.[7] The Office indicated that one side of the conflict was represented by the August 24, 1998 report of Dr. Sgarlat, *i.e.*, a report which was produced approximately two and a half years prior.[8] It also indicated that the other side of the conflict regarding appellant's ability to work was represented by his "treating physicians." The most recent medical report from an attending physician regarding appellant's ability to work was a January 29, 1998 report of Dr. Ambruso, a Board-certified neurosurgeon, *i.e.*, a report which was three years old at the time the conflict was declared in February 2001.[9] Given that there was no conflict in the medical evidence regarding appellant's ability to work around the time of the declaration of the conflict and the referral to Dr. Cooper, the Board notes that Dr. Cooper actually served as an Office referral physician rather than an impartial medical specialist.[10]

In his April 25, 2001 report, Dr. Cooper stated that appellant had cervical disc disease, cervical radiculopathy and lumbar degenerative disc disease which only allowed him to perform

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[6] 20 C.F.R. § 10.124; *See Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

[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." 5 U.S.C. § 8123(a). 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. *William C. Bush*, 40 ECAB 1064, 1975 (1989). 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. *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

[8] Dr. Sgarlat, a Board-certified orthopedic surgeon, initially served as an impartial medical specialist concerning whether appellant required cervical surgery for an employment-related condition. The Office indicated in a February 1, 2001 memorandum that his August 24, 1998 report contained sufficient description of appellant's ability to work to represent one side of a conflict in the medical evidence regarding that issue. In his August 24, 1998 report, Dr. Sgarlat indicated that appellant's cervical, back and right extremity conditions would not prevent him from working; he provided various work restrictions in a form report.

[9] Dr. Ambruso indicated that appellant was unable to work due to his cervical, back and upper extremity conditions.

[10] *See Noah Oooten*, 50 ECAB 283, 286-87 (1999) (indicating that a physician designated as an impartial medical specialist, when in fact there was no conflict in the medical evidence, actually served as an Office referral physician).

a very sedentary type of job that allowed frequent changes in positions. He indicated that appellant could work a 4-hour day with restrictions of no more than 1 hour of sitting and no more than 15 minutes of each of the following activities: walking, standing, pushing, pulling, lifting, squatting, kneeling, climbing, reaching, twisting and engaging in repetitive wrist or elbow motions.[11]

In contrast, the record contains several reports of attending physicians, from around the same period, which indicated that appellant was totally unable to work. Dr. Ambruso indicated in two reports dated September 20, 2001, that on examination appellant was unable to bend forward more than a few degrees and, while he had some sensation in his right hand, it was basically useless due to a previous injury. He noted that appellant was unable to work in any capacity, that his problems were permanent and that he would never work again. In his September 26, 2001 report, he stated that appellant's current condition was the same or worse than his condition in 1998 and noted that because of his cervical and lumbar radiculopathies and his use of medications he was unable to work in any capacity. In an August 27, 2001 report, Dr. Bohn, an attending Board-certified orthopedic surgeon, stated that the degenerative changes in appellant's back, neck, knees and left upper extremity were permanent and would only deteriorate with time. He concluded that appellant's ability to perform any gainful employment was "realistically zero."

Therefore, at the time appellant refused the file clerk position, there was an unresolved conflict in the medical evidence regarding his ability to work. Consequently, the Office did not meet its burden of proof to determine that the file clerk position was suitable.[12] For these reasons, it cannot be found that appellant refused an offer of suitable work.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation effective December 2, 2001, on the grounds that he refused an offer of suitable work.

[11] Dr. Cooper also limited appellant from pushing, pulling, lifting, squatting, kneeling, and climbing with more than five pounds.

[12] Moreover, it should be noted that the actual duties of the file clerk position are not entirely clear. The position description indicated that appellant would not be required to walk, stand, sit, bend, reach, push or pull for more than 15 minutes at a time without changing positions. However, the total amount of time per day that appellant would be required to engage in each of these activities remains unknown.

ORDER

IT IS HEREBY ORDERED THAT the August 15 and April 15, 2003 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: August 10, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member