United States Department of Labor
Employees' Compensation Appeals Board

MARVIN E. CIBULA, Appellant	)	
and	)	**Docket No. 04-1857**
	)	**Issued: December 21, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Cedar Rapids, Employer	)	

Appearances:
Marvin E. Cibula, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On July 20, 2004 appellant filed a timely appeal from an April 16, 2004 decision of the Office of Workers' Compensation Programs, which denied reconsideration of his claim and a January 20, 2004 decision of an Office hearing representative, which affirmed the termination of compensation benefits based on his refusal of suitable employment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits and nonmerits of this case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation under 5 U.S.C. § 8106(c), effective April 8, 2003, based on his refusal to accept suitable employment; and (2) whether the Office properly refused to reopen appellant's claim for further review of the merits on his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On June 19, 2000 appellant, a 55-year-old postmaster, filed an occupational disease claim alleging that his back condition was employment related.[1] The Office accepted the claim for an aggravation of spinal stenosis at L3-4, L4-5 and subsequently placed him on the periodic rolls for temporary total disability.[2]

In a report dated June 8, 2002, Dr. Henry W. Snead, an attending Board-certified internist, opined that appellant was permanently disabled from work. He noted that appellant "has had multiple surgeries to his back that has left him with chronic back pain." Appellant was currently taking duragesic and oxycontin and Dr. Snead opined that appellant was "unable to perform work of any kind using these medications." He noted that appellant's preexisting ankle injury has been aggravated by his multiple back surgeries, stating that appellant could not stand or sit for long periods of time due to pain. Dr. Snead noted that appellant "has a history of injuries and falls due to his back surgeries" and that it would be dangerous for appellant to return to work of any kind.

In a report dated October 1, 2002, Dr. Douglas M. Cooper, a second opinion Board-certified orthopedic surgeon, reviewed a statement of accepted facts, surveillance tape, medical records and performed a physical examination. He diagnosed chronic low back pain and right sciatica. Appellant walked with an antalgic limp, wore a leg brace and had forward flexion of 40 degrees. Dr. Cooper noted that appellant was "diffusely weak throughout," his knees and ankles were symmetric, trace deep tend reflexes and "straight leg raising causes just low back pain." A review of a magnetic resonance imaging scan showed spondylolisthesis at L5 and S1, three levels of degenerative disc disease disc bulges at L3-4, L4-5 and T12-L1, "moderate spinal stenosis at L3-4, mild to moderate at L4-5 and mild spinal stenosis at L4-5." Dr. Cooper noted that the surveillance tape showed appellant frequently bending, touching his toes without difficulty exhibiting, a slight antalgic limp and the ability to twist and lift objects. He concluded that appellant was capable of working 8 hours per day with no lifting more than 25 pounds and no climbing.

On December 12, 2002 the employing establishment offered appellant a modified postmaster position based upon the restrictions noted by Dr. Cooper. The physical requirements including standing, sitting and walking up to 8 hours, no lifting more than 25 pounds, intermittent bending, kneeing and squatting up to 4 hours, no climbing, intermittent twisting up to 8 hours and intermittent pushing/pulling which would not exceed 300 pounds of force.

Appellant refused the position on December 17, 2002.

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[1] Appellant indicated on his claim form that he injured his back in the performance of duty in December 1978 while working at the Marshalltown Post Office in Marshalltown, Iowa and again in 1983 while working at the Tama Post Office in Tama, Iowa.

[2] The Office of Personnel Management approved appellant's disability retirement application on April 24, 2001. On February 10, 2002 appellant filed an election form opting to receive benefits under the Federal Employees' Compensation Act effective May 20, 2001.

On January 10, 2002 the Office received a work capacity evaluation form dated October 1, 2002 by Dr. Cooper. He noted that appellant was capable of pushing and pulling up to 300 pounds for 8 hours, lifting up to 25 pounds for 8 hours, squatting and kneeling up to 4 hours, and sitting, walking standing and twisting up to 8 hours.

In a January 14, 2003 letter, the Office advised appellant that the modified postmaster position was found to be suitable work as it was within his medical restrictions and remained currently available. The Office also advised appellant that under section 8106(c) of the Act (5 U.S.C. § 8106(c)), "a partially disabled employee who refuses to work after suitable work is offered to, procured by or secured for him is not entitled to compensation." Appellant was afforded 30 days in which to either accept the offer or provide "an explanation of the reasons for refusing it." The Office stated that, if appellant failed "to accept the position any explanation or evidence which [he would] provide will be considered prior to determining whether or not [his] reasons for refusing the job are justified."

In a letter dated February 21, 2003, appellant contended that he was unable to perform the offered position and submitted a January 22, 2003 report by Dr. Snead in support of his contention. Dr. Snead noted that appellant "has developed intractable lumbar spinal pain associated with radiculopathy, peripheral neuropathy giving away of his right leg and falls." He opined that appellant's condition worsened, such that he is "incapable of performing the work that is particularly involving bending, twisting, sitting and standing." Dr. Snead also noted while appellant "appears to be able to do activities of daily living," that the falls pose a risk. He recommended a work capacity evaluation be performed.

By letter dated March 18, 2003, the Office advised appellant that his reasons for refusing the offered position were not acceptable and he was given an additional 15 days to respond.

Appellant did not respond within the allotted time.

By decision dated April 8, 2003, the Office terminated appellant's compensation benefits based upon his refusal of an offer of suitable work. The Office indicated that appellant had been sent another notice on March 18, 2003, which provided him 15 days to accept the position and informed him that his reasons for refusing the position were found to be unacceptable.

The record reveals that appellant requested an oral hearing before an Office hearing representative, held on October 22, 2003, at which he submitted evidence and provided testimony. In a June 24, 2003 report, Dr. Nithi (Selvaraj) Anand, a Board-certified neurologist, copies of prescriptions, an April 20, 2003 report by a Dr. Mark Kline and a March 13, 2003 x-ray interpretation by Dr. M.T. Hanigan, a Board-certified diagnostic radiologist.

By decision dated January 20, 2004, an Office hearing representative affirmed the Office's April 8, 2003 decision, finding that the termination of benefits based on a refusal of suitable employment was proper.

In a letter dated April 4, 2004, appellant requested reconsideration. By decision dated April 16, 2005, the Office denied merit review of appellant's claim.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[3] This burden of proof is on the Office when it terminates compensation, under 5 U.S.C. § 8106(c) for refusal to accept suitable work.

Section 8106(c)(2) of the Act provides in pertinent part, "[a] partially disabled employee who ... refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[4] To prevail under this provision, the Office must show that the work offered was suitable and must inform the employee of the consequences of refusal to accept such employment.[5] An employee who refuses or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified.[6] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[7]

The implementing regulation provides 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, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[9]

ANALYSIS -- ISSUE 1

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 the medical evidence.[10] Additionally, it is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.[11] In this instance, the Office relied upon the October 1, 2002 report of Dr. Cooper, the second opinion specialist, to find the December 12, 2002 job offer suitable. While the December 12, 2002 modified postmaster position is entirely consistent with Dr. Cooper's noted restrictions, the medical evidence of record does not clearly establish that appellant is capable of performing the required duties. First, it is not clear from Dr. Cooper's report why he found

[3] *Fred Simpson*, 53 ECAB ___ (Docket No. 02-802, issued August 27, 2002).

[4] 5 U.S.C. § 8106(c)(2).

[5] *Dale K. Nunner*, 53 ECAB ___ (Docket No. 01-1374, issued February 14, 2002).

[6] *Joyce M. Doll*, 53 ECAB ___ (Docket No. 02-311, issued September 25, 2002).

[7] *Anna M. Delaney*, 53 ECAB ___ (Docket No. 00-2090, issued February 22, 2002).

[8] 20 C.F.R. § 10.516 (1999).

[9] *Id.*

[10] *See Gayle Harris*, 52 ECAB 319, 321 (2001); *Maurissa Mack*, 50 ECAB 498 (1999).

[11] *See Gayle Harris, supra* note 10; *Martha A. McConnell*, 50 ECAB 129 (1998).

appellant's only restrictions were lifting and no climbing in view of his findings on physical examination regarding appellant's back and leg problems. Secondly, he does not take into consideration the medications that appellant is taking in finding the proposed position suitable. In particular, Dr. Snead, appellant's treating physician, opined that appellant's medication would prevent him from working. He also concluded that appellant is unable to stand or sit for long periods of time due to the chronic pain, which was a result of multiple back surgeries. Additionally, while Dr. Snead, appellant's treating physician, did not provide a particularly rationalized opinion, he clearly stated that he had not released appellant to return to work and felt it inadvisable to return appellant to work.

The Act provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.[12] Drs. Snead and Cooper disagreed regarding whether appellant was disabled due to his back problems and medication. As there remains an unresolved conflict of medical opinion, the Office failed to carry its burden to justify termination of compensation benefits.[13]

CONCLUSION

The Board finds that the Office failed to establish that the December 12, 2002 job offer was suitable and, therefore, improperly terminated appellant's compensation for refusing to accept this position. In view of the disposition of the first issue in this case, *i.e.*, whether the Office properly terminated appellant's compensation benefits for refusing an offer of suitable work, the Board need not address the second issue, *i.e.*, whether the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[12] 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

[13] *James B. Christenson*, 47 ECAB 775, 778 (1996).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 26 and January 20, 2004 are reversed.

Issued: December 21, 2004
Washington, DC

Alec J. Koromilas
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member