United States Department of Labor
Employees' Compensation Appeals Board

MICHAEL A. STEVENSON, Appellant	)	
and	)	**Docket No. 02-1922**
	)	**Issued: February 11, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Piscataway, NJ, Employer	)	

Appearances:
Rebecca L. Georgia, Esq., for the appellant
Miriam D. Ozur, Esq., for the Director

Oral Argument Held November 20, 2003

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On July 18, 2002 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated January 15, 2002 denying modification of its August 10, 2000 decision, terminating his compensation on the grounds that he refused an offer of suitable work. Pursuant to 20 C.F.R. §§ 10.501.2(c) and 501.3, the Board has jurisdiction over the Office's January 15, 2002 decision and also its June 18, 2002 decision denying his request for an oral hearing. The Board also has jurisdiction over the October 29, 2001 Office decision denying modification of its termination decision.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation pursuant to section 8106(c) of the Federal Employees' Compensation Act; and (2) whether the Office properly denied appellant's request for a hearing on the grounds that he had already obtained review of his claim under section 8128 of the Act.

FACTUAL HISTORY

On May 22, 1992 appellant, then a 30-year-old letter carrier, filed a traumatic injury claim alleging that on May 21, 1992 he injured his left leg when he slipped on steps. The Office accepted his claim for a left leg strain. Appellant stopped work on May 30, 1992 and began receiving compensation for temporary total disability.

Appellant's attending physician, Dr. David Lessing, released him to return to light-duty work for four hours a day as of June 12, 1997. He was referred for vocational rehabilitation on August 14, 1997. Appellant then elected to receive Office of Personnel Management (OPM) benefits and his rehabilitation program was suspended. In March 1999 he elected benefits under the Act in lieu of OPM benefits.

In reports dated October 13, 1998 and January 13, 2000, Dr. Sandra L. Propst-Proctor, an attending Board-certified orthopedic surgeon, diagnosed reflex sympathetic dystrophy of the left knee and opined that appellant was totally disabled.

On July 27, 1999 Dr. Peter A. Feinstein, a Board-certified orthopedic surgeon and an Office referral physician, examined appellant and determined that his 1992 employment injury had resolved.

Due to the conflict in the medical opinion evidence between Dr. Propst-Proctor and Dr. Feinstein, the Office referred appellant to Dr. James J. Heinz, a Board-certified orthopedic surgeon, for an examination and an evaluation in order to resolve the conflict.

In a report dated October 29, 1999, Dr. Heinz provided a history of appellant's condition and findings on examination. He indicated that appellant sustained a relatively minor left knee injury in 1992, which by history, was consistent with a medial menicus tear and knee sprain that was treated appropriately. Dr. Heinz stated:

> "[Appellant's] current symptomatology is consistent with the diagnosis of reflex sympathetic dystrophy. This diagnosis is made taking into account the signs and symptoms of persistent pain out of proportion to the degree of trauma and injury. However, reflex sympathetic dystrophy does not account for all of [appellant's] current and ongoing symptoms. He suffers from a complex interplay of chronic ill-defined knee pain syndrome with reflex sympathetic dystrophy contributing to this, as well as interaction of secondary gain issues and relatively large body habitus and potentially some age-related changes in his left knee. Notwithstanding the work injury in question, he may have some symptoms in his left knee related to age-related wear and tear and/or tendinitis or patellofemoral symptoms related to his size and the physical demands of his daily activities, including his occupation as well as other activities….
>
> "No orthopedic surgical intervention is indicated now or in the future for work-related injuries or ongoing symptoms….

> "[Appellant] has moderate to significant impairment as the result of the interaction of the diagnosis as listed above in his ability to perform daily activities and *must be considered disabled from all activities other than sedentary or occasional light work*. In addition, he is of course disabled from his position as a [l]etter [c]arrier. I cannot, however, consider him disabled from any and all occupations. This is based on his ability to ambulate, particularly with the use of a support and ability to function without the use of mood altering narcotics or other medications, other than Amytriptylline…."

In an accompanying work-capacity evaluation, Dr. Heinz indicated that appellant could work for 8 hours a day with walking and standing limited to 2 to 4 hours in a total workday, pushing and pulling limited to 1 to 2 hours a day with no greater than 50 pounds, lifting of no greater than 25 pounds limited to 4 hours a day, occasional climbing of stairs and no squatting or kneeling.

On April 20, 2000 the Office's district medical director, Dr. Michael F. Quinlan, reviewed the employing establishment's proposed job offer and opined that the job was within the work tolerance restrictions of Dr. Heinz.

On April 26, 2000 the employing establishment offered appellant the position of modified part-time flexible clerk, stating that the position was in accordance with the physical limitations set by Dr. Heinz. The physical requirements of the job included intermittent standing, sitting and walking, intermittent lifting and carrying up to 20 pounds, intermittent pushing up to 21 pounds, intermittent bending up to 1 hour, intermittent twisting up to 2 hours and intermittent reaching as needed. Appellant declined the position.

By letter dated May 11, 2000, the Office advised appellant that he had 30 days to either accept the offered position or provide reasons for refusing the position. The Office advised appellant of the consequences of refusing an offer of suitable work without justification.

In a letter dated May 5, 2000, received by the Office on July 24, 2000 appellant stated that he was unable to accept the position because he had reflex sympathetic dystrophy, which caused sitting and standing to be painful and his medications made driving difficult.

Appellant submitted reports from two physicians who indicated that appellant's medication could cause drowsiness, fatigue, amnesia and nervousness.

By letter dated July 25, 2000, the Office advised appellant that the reasons he gave for refusing the position were unacceptable and he had 15 days, in which to accept the position without penalty. There was no response from appellant.

By decision dated August 10, 2000, the Office terminated appellant's compensation effective August 13, 2000, on the grounds that he refused an offer of suitable work.

Appellant requested reconsideration and submitted additional evidence. In an August 16, 2000 report, Dr. Propst-Proctor stated that she had reviewed the offered position description and

did not feel that appellant could perform the physical requirements. She stated that he was unable to stand or walk for any significant time and was unable to lift or carry anything greater than five pounds. Dr. Propst-Proctor indicated that pushing and pulling would be unacceptable due to appellant's lower extremity symptoms and bending and twisting would also not be advised.

By merit decision dated November 15, 2000, the Office denied modification of its decision to terminate appellant's compensation.

Appellant requested reconsideration and submitted additional evidence. In a February 28, 2001 report, Dr. Debra A. De Angelo, an osteopath, stated that she had reviewed the position description and opined that appellant could not perform the position because his condition did not permit even intermittent walking or lifting, carrying greater than five pounds, or any pushing or pulling.

By merit decisions dated October 29, 2001 and January 15, 2002, the Office denied modification of its termination decision.

Appellant requested a hearing.

By decision dated June 18, 2002, the Office denied appellant's request for an oral hearing on the grounds that he had previously requested reconsideration. The Office exercised its discretion and determined that the issue in the case, a medical issue, could be pursued through the submission of additional medical evidence and a request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits and this includes cases, in which the Office terminates compensation under section 8106(c) of the Act for refusing to accept suitable work or neglecting to perform suitable work.[1] Section 8106(c) 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."[2] However, to justify such termination, the Office must show that the work offered was suitable[3] and must inform the employee of the consequences of refusal to accept such employment.[4] An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified[5] and shall be

[1] *Shirley B. Livingston*, 42 ECAB 855 (1991).

[2] 5 U.S.C. § 8106(c).

[3] *David P. Camacho*, 40 ECAB 267 (1988); *Carl W. Putzier*, 37 ECAB 691 (1986).

[4] *Arthur C. Reck*, 47 ECAB 339 (1995); *Kathy M. Webb*, 36 ECAB 242 (1984).

[5] 20 C.F.R. § 10.517(a).

provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation.[6]

ANALYSIS -- ISSUE 1

Based on the report of Dr. Heinz, the impartial medical specialist, the employing establishment offered appellant the position of a modified part-time flexible clerk. The Office properly referred appellant to Dr. Heinz after finding a conflict in medical evidence regarding appellant's ability to work between Dr. Propst-Proctor, an attending Board-certified orthopedic surgeon and Dr. Feinstein, a Board-certified orthopedic surgeon, who served as an Office referral physician.[7] The Office's district medical director, Dr. Quinlan, reviewed the job offer and opined that the physical requirements were in accordance with those set by Dr. Heinz. By letter dated May 11, 2000, the Office advised appellant that the position was determined to be suitable for him and informed him of the consequences of refusal to accepted suitable work under section 8106 of the Act. Appellant refused the position because of his reflex sympathetic dystrophy condition and his medications.

Where a case is referred to an impartial medical specialist, for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[8] The Board finds that the physical limitations set by Dr. Heinz do not appear to be consistent with his statement that appellant could perform only "sedentary work with occasional light duty." He indicated in the work-capacity evaluation form that appellant could walk and stand up to four hours of an eight-hour workday, lift up to four hours and push and pull up to two hours. These limitations do not appear to be consistent with a "sedentary or occasional light[-]work" position as stated on page four of his report. Additionally, the physical requirements in the offered position description are not completely consistent with the physical restrictions set by Dr. Heinz. The restrictions set by Dr. Heinz listed maximum hours for the various physical activities. However, the offered position does not list the maximum hours for standing, walking, lifting, carrying and reaching. The offered position describes the activity times only as "intermittent." Furthermore, the work capacity evaluation form completed by Dr. Heinz does not list the physical activities of carrying or bending. Therefore, Dr. Heinz's opinion as to appellant's work capacity regarding those activities is not known. The activities of reaching and twisting appear on the form completed by Dr. Heinz but he left these blank. For most of the other physical activities, he entered the maximum number of hours permitted, including "none" for squatting and kneeling. However, because he left blank the listing for twisting, Dr. Heinz's opinion as to whether appellant could perform intermittent twisting up to two hours as listed on the employing

[6] 20 C.F.R. § 10.516.

[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." 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); 5 U.S.C. § 8123(a).

[8] *See Roger Dingess*, 47 ECAB 123 (1995); *Juanita H. Christoph*, 40 ECAB 354 (1988).

establishment position description is not known. Considering all the deficiencies in Dr. Heinz's report and the position description, the Office improperly determined that the position was suitable for appellant and did not meet its burden of proof in terminating appellant's compensation on the grounds that he refused an offer of suitable work.[9]

CONCLUSION

The Board finds that the Office did not meet its burden of proof in terminating appellant's compensation.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 15, 2002 and October 29, 2001 are reversed.

Issued: February 11, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[9] In light of the Board's resolution of the first issue, the second nonmerit issue is moot.