United States Department of Labor
Employees' Compensation Appeals Board

MICHAEL G. MCDONALD, Appellant	)	
	)	**Docket No. 04-52**
and	)	**Issued: March 11, 2004**
	)	
U.S. POSTAL SERVICE, POST OFFICE, Coppell, TX, Employer	)	

Appearances:
Michael G. McDonald, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On October 6, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated September 22, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office met its burden of proof to terminate appellant's compensation effective March 29, 2002, on the grounds that he refused an offer of suitable work.

FACTUAL HISTORY

On August 29, 1994 appellant, then a 46-year-old clerk, filed an occupational disease claim alleging that he developed left carpal tunnel syndrome and a neck condition as a result of performing repetitive duties at work including lifting tubs of flats of mail hampers. Appellant worked intermittently and stopped on July 29, 1994 and returned on April 12, 2002. The Office

accepted the claim for myofascial pain syndrome, cervical strain, left rotator cuff tendinitis, left subacromial bursitis, left bicipital tendinitis and authorized a cervical discectomy and fusion at C5-6.

Appellant submitted treatment notes from Dr. Charles R. Gordon, a Board-certified neurologist, dated October 1996 to August 6, 1999, which noted his treatment of appellant for work-related left carpal tunnel syndrome, left shoulder impingement and spondylosis at C4-5, C5-6 and C6-7 as confirmed by electrodiagnostic tests and a computerized axial tomography scan. The physician noted that appellant underwent two surgeries under his direction, the most recent one, a foraminotomy at C4-5 and C5-6, was performed in 1998, however, he continued to experience neck and left arm pain and was disabled from working.

Thereafter, the employing establishment offered appellant several jobs dated September 9, 1998, November 16 and November 22, 1999, all of which appellant declined.

Appellant submitted reports from Dr. Gordon dated February 29, April 14 and May 1, 2000, which advised that job offers were not appropriate and violated his medical work restrictions. He noted that appellant was still experiencing significant pain in the neck and had an abnormal myelogram.

On May 23, 2000 the Office referred appellant for a second opinion to Dr. George E. Medley, a Board-certified orthopedist. The Office provided Dr. Medley with appellant's medical records, a statement of accepted facts as well as a detailed description of appellant's employment duties.

In a medical report dated June 14, 2000, Dr. Medley indicated that he reviewed the records provided to him and performed a physical examination of appellant. He noted a history of appellant's condition. The physician diagnosed degenerative cervical disc disease, postoperative status following cervical laminectomy and fusion. Dr. Medley noted positive findings on physical examination including range of motion, pain with the cervical compression test. He concluded that appellant could perform a sedentary light-duty position eight hours a day.

On August 22, 2000 appellant was referred for vocational rehabilitation.

On August 30, 2000 the employing establishment offered appellant a position as a modified distribution clerk, incumbent only. The duties included nixie, rewrapping mail and weighing mail, eight hours per day, subject to the restrictions set forth by Dr. Medley.

In a letter dated September 13, 2000, appellant declined the job offer.

Thereafter, appellant submitted a report from Dr. Gordon dated September 14, 2000, which advised that he reviewed the position description for the modified distribution clerk job and determined that appellant was not capable of performing the duties as he still exhibited a positive Spurling's test.

By letter dated October 11, 2000, the Office informed appellant that it had reviewed the position description and found the job offer suitable with his physical limitations. Appellant was advised that he had 30 days to accept the position or offer his reasons for refusing. He was apprised of the penalty provisions of the Federal Employees' Compensation Act[1] if he did not return to suitable work.

By decision dated November 22, 2000, the Office terminated appellant's compensation, finding that he refused an offer of suitable work.

By letter dated December 15, 2000, appellant requested an oral hearing before an Office hearing representative.

In a decision dated April 10, 2001, the hearing representative reversed the decision of the Office dated November 22, 2000. The Office determined that a conflict of medical opinion had been established between Dr. Gordon, appellant's treating physician, who indicated that appellant could not perform the job duties involved in the August 30, 2000 job offer and Dr. Medley, an Office referral physician, who determined that appellant could perform the duties in the job offer.

To resolve the conflict appellant was referred to a referee physician, Dr. Richard S. Levy, a Board-certified orthopedic surgeon, who indicated in a report dated August 10, 2001, that he reviewed the records provided to him and performed a physical examination of appellant. He noted a history of appellant's work-related injury. Dr. Levy diagnosed cervical radicular syndrome, status post discectomy and fusion, C5-6 and C6-7, left carpal tunnel syndrome and status post carpal tunnel release. Dr. Levy noted objective findings of healed surgical incisions, a minimal amount of atrophy, which he attributed to appellant not being left handed, mild atrophy in the left arm and biceps, with lingering of symptoms from his two-level cervical fusion and carpal tunnel release. He advised that appellant's current symptoms were out of proportion to the objective findings. Dr. Levy indicated that appellant could perform work that does not involve repetitive rotating of the head and lifting more than 20 pounds, specifically he could perform the following duties 6 hours per day: casing mail at a letter case for 3 hours; rewrapping damaged letters, flats and parcels for 5 hours; sitting for six hours per day; and intermittent pushing, pulling and lifting of 0 to 20 pounds during the 6-hour day, with intermittent walking and reaching above the head. Dr. Levy further advised that the work would have to be done in front of him, so that his head is balanced over his shoulders and that appellant was not able to repetitively turn his head from left or right, up or down in order to perform the duties.

Appellant submitted reports from Dr. Gordon dated May 4 and November 7, 2001, which diagnosed possible cubital tunnel syndrome and advised that the electromyogram (EMG) was negative. His note of November 7, 2001, advised that appellant continued to have neck and left shoulder pain and he opined that appellant was completely and totally disabled due to his employment injury of March 10, 1994 and was unable to seek gainful employment at this time.

[1] 5 U.S.C. §§ 8108-8193.

By letter dated November 9, 2001, the employing establishment offered appellant a position as a modified distribution clerk, incumbent only, for six hours per day, from 5:00 p.m. to 11:00 p.m. The duties included nixie and rewrapping of damaged letters, flats and parcels, weighing and rating mail and processing return to writer mail. The employing establishment indicated that all the work would be performed directly in front of appellant without any need for turning or twisting of the neck. The physical limitations included lifting up to 10 pounds, sitting for 6 hours and intermittent standing 1 hour. The position was in accordance with the physical limitations as set forth by Dr. Levy of lifting, pushing and pulling up to 10 pounds for 3 hours per day, sitting up to 6 hours per day, reaching up to 3 hours per day, no reaching above the shoulders, squatting, kneeling or climbing, a 10-minute break every 2 hours and working no more than 6 hours per day.

By letter dated January 10, 2002, the Office informed appellant that it had reviewed the position description and found the job offer suitable with his physical limitations. Appellant was advised that he had 30 days to accept the position or offer his reasons for refusing. He was apprised of the penalty provisions of the Act[2] if he did not return to suitable work.

In a letter appellant responded to the Office's letter and declined the November 9, 2001 job offer. He indicated that he continued to experience severe pain and his medication affects his ability to think clearly. Appellant indicated that he has applied for disability retirement and would request that his compensation continue until his retirement is approved. Appellant submitted a report from Dr. Gordon dated January 22, 2002, who advised that appellant continued to have neck and left shoulder pain and he opined that appellant was completely and totally disabled due to his employment injury of March 10, 1994 and was unable to seek gainful employment at this time.

By letter dated March 5, 2002, the Office informed appellant that his refusal of the offered position was found to be unjustified. The Office indicated that the position was within the restrictions as set forth by Dr. Levy. The Office provided appellant with 15 days to accept the job.

By decision dated March 29, 2002, the Office terminated appellant's compensation, finding that he refused an offer of suitable work.

By letter dated April 22, 2002, appellant requested a hearing before an Office hearing representative. The hearing was held on October 23, 2002. Appellant submitted reports from Dr. Gordon dated July 1 to November 11, 2002, which noted appellant's continued complaints of pain in the neck, left shoulder and left arm. Dr. Gordon's note of November 11, 2002, advised that appellant was totally and completely disabled due to multiple neck surgeries. The physician indicated that appellant could not perform any specific job because of his medications and the limitation that he currently experienced. Also submitted was an EMG dated August 14, 2002, which revealed no abnormalities. A magnetic resonance imaging scan dated August 19, 2002, revealed a central broad-based disc protrusion or spur at C3-4.

[2] *Id*.

In a decision dated December 16, 2002, the Office hearing representative affirmed the prior decision.

By letter dated July 3, 2003, appellant requested reconsideration and submitted reports from Dr. Gordon dated April 17 and June 11, 2003, which noted appellant's continued pain in the neck, which radiated into the left shoulder and arm and indicated that appellant would be treated conservatively with medication. His report of June 11, 2003, noted positive physical findings and advised that appellant was currently disabled and unable to return to work. The physician opined that due to appellant's current condition and inability to manage his pain, this prevented him from returning to work. A functional capacity evaluation performed July 3, 2003, indicated that appellant was not presently a candidate for a work hardening/conditioning program because of the severity of his present condition and the inability to manage his pain.

By decision dated September 22, 2003, the Office denied appellant's request for reconsideration on the grounds that evidence submitted was insufficient to warrant modification of the prior decision.

LEGAL PRECEDENT

Section 8106(c)(2) of the Act[3] 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 employment. 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.[5] Section 8106(c) will be narrowly construed as it serves as a penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[6]

The Office's implementing federal regulations[7] provide that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of establishing that such refusal or failure to return 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.[8] To justify termination of compensation, the Office must show that the work offered was suitable and inform the employee of the consequences of refusal to accept such employment.[9]

---

[3] *Id*.

[4] 5 U.S.C. § 8106(c)(2).

[5] *See Michael I. Schaffer*,46 ECAB 845 (1995).

[6] *See Robert Dickerson*, 46 ECAB 1002 (1995).

[7] 20 C.F.R. § 10.517 (1999).

[8] *Id.*

[9] *Arthur C. Reck*, 47 ECAB 339 (1995).

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 medical evidence.[10] In assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[11]

ANALYSIS

In this case, the Office accepted appellant's claim for myofascial pain syndrome, cervical strain, left rotator cuff tendinitis, left subacromial bursitis, left bicipital tendinitis and authorized a cervical discectomy and fusion at C5-6. The Office reviewed the medical evidence and determined that a conflict in medical opinion existed between appellant's attending physician, Dr. Gordon, who disagreed with Dr. Medley, the Office referral physician, concerning whether appellant was able to perform the duties in the offered position. Consequently, the Office referred appellant to Dr. Levy to resolve the conflict.

The Board finds that under the circumstances of this case the opinion of Dr. Levy is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight and establishes that appellant's work-related condition has ceased.

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.[12]

Dr. Levy reviewed appellant's history, reported findings and diagnosed cervical radicular syndrome, status post discectomy and fusion, C5-6 and C6-7, left carpal tunnel syndrome and status post carpal tunnel release. He noted objective findings of healed surgical incisions, a minimal amount of atrophy, which he attributed to appellant not being left handed, mild atrophy in the left arm and biceps, with lingering of symptoms from his two-level cervical fusion and carpal tunnel release. Dr. Levy advised that appellant's current symptoms were out of proportion to the objective findings and that appellant could perform work that did not involve repetitive rotating of the head and lifting more than 20 pounds.

The Board finds that the Office properly relied on Dr. Levy's August 10, 2001 opinion as the basis for terminating benefits. Dr. Levy's opinion is sufficiently well rationalized and based upon a proper factual background. He not only examined appellant, but also reviewed appellant's medical records. Dr. Levy also reported accurate medical and employment histories.

[10] *See Marilyn D. Polk*, 44 ECAB 673 (1993).

[11] *See Connie Johns*, 44 ECAB 560 (1993).

[12] *Aubrey Belnavis*, 37 ECAB 206 (1985).

Accordingly, the Office properly accorded determinative weight to the impartial medical examiners August 10, 2001 findings.[13]

In this case, the Office established that the offered position of November 9, 2001, was suitable. Dr. Levy prepared a work restriction evaluation dated August 10, 2001 and advised that appellant could perform the following duties 6 hours per day: casing mail at a letter case for 3 hours, rewrapping damaged letters, flats and parcels for 5 hours, sitting for 6 hours per day and intermittent pushing, pulling and lifting of 0 to 20 pounds during the 6-hour day, with intermittent walking and reaching above the head. He further advised that the work would have to be done in front of him, so that his head is balanced over his shoulders and that appellant was not able to repetitively turn his head from left or right, up or down in order to perform the duties.

The employing establishment offered appellant a position as a modified distribution clerk, incumbent only, for 6 hours per day, from 5:00 p.m. to 11:000 p.m. The duties included nixie and rewrap of damaged letters, flats and parcels, weigh and rate mail, return to writer mail, with all work directly in front of appellant without any need for turning or twisting of the neck. The physical limitations included lifting up to 10 pounds, sitting for 6 hours, intermittent standing for 1 hour and the physical limitation of the job as set forth by Dr. Levy were: lifting, pushing and pulling up to 10 pounds for 3 hours per day, sitting up to 6 hours per day, reaching up to 3 hours per day, no reaching above the shoulders, squatting, kneeling or climbing, a 10-minute break every 2 hours and working no more than 6 hours per day.

Appellant submitted reports from Dr. Gordon dated May 4 and November 7, 2001 and January 22, 2002, which advised that appellant continued to have neck and left shoulder pain and opined that appellant was completely and totally disabled due to his employment injury of March 10, 1994 and was unable to seek gainful employment at this time. This evidence was insufficient to show that the offered position was not medically suitable. Dr. Gordon's treatment note merely noted appellant's symptoms but did not address the suitability of the offered position. His opinion, however, while generally supporting continuing disability, does not explain how appellant's condition and residuals prevented his return to work in the modified position on November 9, 2001 when the Office notified him of the offered position and its finding that it was suitable. The reports of Dr. Gordon are not sufficient to establish that appellant remained totally disabled due to physical limitations on lifting at the time the job was offered or at any time prior to the termination of benefits.[14]

[13] In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *Gary R. Sieber,* 46 ECAB 215, 225 (1994).

[14] *See Gayle Harris*, 52 ECAB 319 (2001).

Appellant indicated that he intended on retiring and this was a factor in his decision to decline the job offer. However, retirement is not an acceptable reason for refusing suitable work.[15] The medical evidence of record thus establishes that, at the time the job offer was made, appellant was capable of performing the modified position.

The Office properly demonstrated that the modified position offered appellant was suitable work based on the restrictions of Dr. Levy at the time. The burden then shifted to appellant to show that his refusal to work in that position was justified.[16]

Following the Office's March 29, 2002 decision, appellant testified at the hearing and raised essentially the same arguments. However, as noted above, these arguments are insufficient to establish that the offered position was unsuitable and are, therefore, insufficient to meet appellant's burden of proof. Appellant also submitted additional medical evidence from Dr. Gordon, where he noted, in reports dated July 1 to November 11, 2002 and April 17 and June 11, 2003, appellant's continued complaints of pain in the neck, left shoulder and left arm and advised that appellant was totally and completely disabled due to multiple neck surgeries and could not perform any specific job because of his medications and the limitation that he currently experienced. However, these reports are similar to Dr. Gordon's previous reports and are insufficient to show that the offered position was not medically suitable.[17] Additionally, the Board notes that, although the functional capacity evaluation performed July 3, 2003, indicated that appellant was not presently a candidate for a work hardening/conditioning program because of the severity of his present condition and the inability to manage his pain, this report did not explain how appellant's condition and residuals prevented his return to work in the modified position on November 9, 2001 when the Office notified him of the offered position and its finding that it was suitable. Therefore, appellant failed to submit any evidence or argument to show that the offered position was not medically suitable.[18]

In order to properly terminate appellant's compensation under section 8106, the Office must provide appellant notice of its finding that an offered position is suitable and give him an opportunity to accept or provide reasons for declining the position.[19] The record in this case indicates that the Office properly followed the procedural requirements. By letter dated January 10, 2002, the Office advised appellant that a partially disabled employee who refused

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment*: *Determining Wage-Earning Capacity*, Chapter 2.814.5(c) indicates that unacceptable reasons for refusing an offer of suitable work include the claimants; preference for the area, in which he or she currently resides, personal dislike of the position offered or the work hours scheduled, potential for promotion and job security; *see also Stephen R. Lubin*, 43 ECAB 564 (1992) (finding that appellant's decision to accept retirement benefits did not justify his refusal of a position found to be suitable work).

[16] *See Ronald M. Jones*, 52 ECAB 190 (2000).

[17] Evidence that repeats or duplicates evidence already in the case record has not evidentiary values; *see Daniel Deparini*, 44 ECAB 657 (1993).

[18] *See Ronald M. Jones*, *supra* note 16.

[19] *See Maggie L. Moore*, 42 ECAB 484 (1991), *aff'd on recon.*, 43 ECAB 818 (1992).

suitable work was not entitled to compensation, that the offered position had been found suitable and allotted him 30 days to either accept or provide reasons for refusing the position.

In a letter dated March 5, 2002, the Office advised appellant that the reasons given for not accepting the job offer were unacceptable. He was given an additional 15 days in which to respond. The record reflects that appellant did respond to the Office's notice and indicated that he continued to experience severe pain and his medication affects his ability to think clearly and planned to apply for disability retirement. There is, thus, no evidence of a procedural defect in this case as the Office provided appellant with proper notice. He was offered a suitable position by the employing establishment and such offer was refused. Thus, under section 8106 of the Act, his compensation was properly terminated effective March 29, 2002.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation based on his refusal of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the September 22, 2003 and December 16, 2002 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 11, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member