United States Department of Labor
Employees' Compensation Appeals Board

EDWARD S. MITCHELL, JR., Appellant	)	
and	)	**Docket No. 04-358**
	)	**Issued: November 29, 2004**
U.S. POSTAL SERVICE, POST OFFICE, New Castle, PA, Employer	)	

Appearances:
Edward S. Mitchell, Jr., 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 November 25, 2003 appellant filed a timely appeal from a November 13, 2003 decision of the Office of Workers' Compensation Programs denying modification of its September 5, 2003 decision that terminated his compensation because he refused an offer of suitable work. Pursuant to 20 C.F.R. § 501.2(c) and 501.3, the Board has jurisdiction over the November 13 and September 5, 2003 decisions.

ISSUE

The issue is whether the Office properly terminated appellant's compensation on the grounds that he refused an offer of suitable work.

FACTUAL HISTORY

On February 6, 2002 appellant, then a 53-year-old distribution clerk, filed a traumatic injury claim alleging that he injured his lower back while lifting and throwing bundles of mail. The Office accepted his claim for a low back strain.

Effective June 16, 2002 appellant was placed on the periodic compensation rolls to receive compensation for temporary total disability.

In clinical notes and disability certificates dated August 9, 2002, Dr. Je H. Kim, appellant's attending Board-certified physiatrist, indicated that appellant could return to work in four weeks. On September 6, 2002 Dr. Kim indicated that appellant should not return to work until he received a work capacity evaluation.

In a January 30, 2003 narrative report, Dr. Jeffrey D. Lemberg, a Board-certified physiatrist and an Office referral physician, reviewed appellant's condition and provided physical findings on examination. He noted that a February 28, 2002 lumbar magnetic resonance imaging (MRI) scan revealed disc bulging and protrusions at L4-5 and L5-S1, a July 8, 2002 cervical MRI scan revealed spondylosis with disc bulging at C3-7 and a July 8, 2002 lumbar MRI scan was consistent with mild disc herniations at L4-5 and L5-S1. Dr. Lemberg stated his impression of chronic lower back pain, evidence of disc dessication and bulging at the L4-5 and L5-S1 levels, exaggerated pain behaviors, and a history of anxiety and/or depression. He opined that appellant's cervical complaints were unrelated to the February 6, 2002 employment injury. Dr. Lemberg stated that he was not aware of any substantial nonwork-related or preexisting conditions other than anxiety and depression which played a role in appellant's perception of his chronic lower back problems. He provided work restrictions that included sitting for 5 to 7 hours a day, walking and standing for 1 hour, occasional lifting of no more than 10 pounds, occasional climbing, no pushing, pulling or twisting, limitations on reaching and 15-minute breaks every 2 hours. Dr. Lemberg indicated that it might be useful to refer appellant to an anesthesiologist associated with a pain clinic which considered patients for discograms, to see if a torn annulus at the L4-5 or L5-S1 level was the source of his pain.

On April 11, 2003 the Office asked Dr. Kim to review Dr. Lemberg's report and indicate whether he agreed that appellant could return to limited-duty work.[1]

On May 15, 2003 the Office advised appellant and the employing establishment that Dr. Lemberg found appellant capable of full-time sedentary work. It asked the employing establishment to provide him with a job offer within the physical restrictions set forth in Dr. Lemberg's report.

On June 20, 2003 the employing establishment noted the physical restrictions provided by Dr. Lemberg and offered appellant a full-time limited-duty position as a mail processing clerk that involved working at the manual letter case and/or manual flat case and other duties as assigned by his supervisor that met his medical restrictions. The physical requirements of the position included sitting, standing and walking and occasional lifting of no more than 10 pounds.

On June 24, 2003 appellant declined the offered position, indicating that Dr. Kim recommended that he remain off work until a discogram was completed and reviewed.

[1] No response was received.

By letter dated July 17, 2003, the Office advised appellant that it had reviewed the mail processing clerk position offered by the employing establishment and found it to be suitable to his physical restrictions as set forth in Dr. Lemberg's January 30, 2003 report. It notified appellant that he had 30 days in which to accept the position or provide a written explanation for refusing it. The Office advised him that if he failed to report for work without justification, his compensation would be terminated.

In an undated letter received by the Office on July 28, 2003, appellant indicated that he could not return to work until December 6, 2003. He disputed Dr. Lemberg's finding that he could walk or stand for one hour.

On August 20, 2003 the Office advised appellant that it had considered the reasons he provided for refusing the offered position and did not find them to be acceptable. It allotted appellant 15 days in which to accept the position.

On September 5, 2003 the employing establishment advised the Office that appellant had not returned to work or made any arrangements to accept the job offer.

By decision dated September 5, 2003, the Office terminated appellant's disability compensation effective that date on the grounds that he refused an offer of suitable work.

On September 12, 2003 appellant requested reconsideration and submitted additional evidence.

In an undated letter, Dr. Kim stated that Dr. Lemberg had recommended a discogram and a consultation with an anesthesiologist at a pain clinic but appellant was not sure he wished to have the discogram. He indicated that if appellant chose not to have the discogram he could nevertheless perform the clerical job offered by the employing establishment on June 22, 2003.

By letter dated October 20, 2003, appellant stated that he refused the job offer on the advice of Dr. Kim.

By decision dated November 13, 2003, the Office denied modification of its September 5, 2003 decision on the grounds that the evidence submitted was insufficient to warrant modification.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[2] The Office has authority under section 8106(c)(2) of the Federal Employees' Compensation Act to terminate compensation for any partially disabled employee who refuses or neglects to work after suitable work is offered.[3] To justify termination,

[2] *Roberto Rodriguez,* 50 ECAB 124 (1998).

[3] 5 U.S.C. § 8106(c).

the Office must show that the work offered was suitable and that appellant was informed of the consequences of his or her refusal to accept such employment.[4] Once the Office has demonstrated that the job offered is suitable, the burden shifts to the employee to show that his or her refusal to work is reasonable or justified.[5]

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.[6] In assessing medical evidence, the number of physicians supporting one position over 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.[7]

ANALYSIS

The Board finds that the limited-duty position offered to appellant constituted suitable work based on the opinion of Dr. Lemberg, who stated that appellant could work with restrictions that included sitting for 5 to 7 hours a day, walking and standing for 1 hour, occasional lifting of no more than 10 pounds, occasional climbing, no pushing, pulling or twisting, limitations on reaching and 15-minute breaks every 2 hours. Because the limited-duty job offer from the employing establishment is within the work restrictions provided by Dr. Lemberg, the Office met its burden to establish that the position was suitable.

In the case of *Maggie L. Moore*, the Board held that when the Office makes a preliminary determination of suitability and extends the employee a 30-day period either to accept or to give reasons for not accepting, the Office must consider any reasons given before it can make a final determination on the issue of suitability. Should the Office find the reasons unacceptable, it may finalize its preliminary determination of suitability, but it may not invoke the penalty provision of section 8106(c) without first affording the employee the opportunity to accept or refuse the offer of suitable work with notice of the penalty provision.[8]

Because appellant was offered a suitable job, he had the burden to demonstrate that his refusal was justified. FECA Bulletin No. 92-19, issued on July 31, 1992, adapted Office procedure to comply with the Board's ruling in *Moore*. The bulletin provides that, if the reasons given for refusal are considered unacceptable, the claimant will be informed of this by letter, given 15 days from the date of the letter to accept the job and advised that the Office will not

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

[5] *See* 20 C.F.R. § 10.517; *Ronald M. Jones*, *supra* note 4.

[6] *Maurissa Mack*, 50 ECAB 498 (1999).

[7] *Id*.

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

consider any further reasons for refusal. If the employee does not accept the job within the 15-day period, compensation will be terminated under section 8106(c).[9]

The Office followed these procedures in this case and afforded appellant the protections set forth in *Moore*. The Office gave appellant a reasonable opportunity to accept the offer of employment, notified him of the penalty provision of section 8106(c) and properly considered his reasons for refusing the offer job. After reviewing this evidence, the Office notified appellant that his evidence was insufficient to change the suitability determination. The Office then extended appellant another 15 days to accept the job after his reasons for refusing it were deemed unreasonable. When he did not accept, the Office properly invoked the penalty provision of section 8106(c). Thus, the Board finds that the Office met its burden of proof in terminating appellant's compensation.

Subsequent to the termination of compensation, in conjunction with a reconsideration request, appellant again raised the issue of whether or not the job offer was suitable. He disputed Dr. Lemberg's finding that he could walk or stand for one hour. However, he provided no medical evidence in support of his assertion that he could not walk or stand for one hour. As noted above, the determination of whether appellant is capable of performing the offered position is a medical question that must be resolved by medical evidence. Therefore, appellant's assertion that he could not perform the offered position is of no probative value. As the medical evidence of record indicates that the offered position is consistent with appellant's physical limitations, his belief that the job was unsuitable is not sufficient to change the suitability determination.

Appellant also asserted that he could not return to work until he had a discogram as recommended by Dr. Lemberg. However, neither Dr. Lemberg nor Dr. Kim opined that he was unable to work until a discogram was obtained. In his January 30, 2003 report, Dr. Lemberg merely indicated that a discogram and a consultation with an anesthesiologist might be useful in appellant's continuing treatment. Dr. Kim indicated that, whether or not appellant underwent the discogram recommended by Dr. Lemberg, he could still perform the clerical job offered by the employing establishment. Consequently, the weight of the medical evidence demonstrates that appellant could perform the limited-duty job offered to him and, therefore, the Office, relying on Dr. Lemberg's report, properly terminated appellant's compensation for his failure to accept suitable work.

CONCLUSION

The Board finds that the Office properly terminated appellant's disability compensation effective September 5, 2003 because he refused an offer of suitable work.

[9] *See* 20 C.F.R. § 10.516-517; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(d)(1) (July 1997).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 13 and September 5, 2003 are affirmed.

Issued: November 29, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member