United States Department of Labor
Employees' Compensation Appeals Board

ANTONIO H. LAFORE, Appellant **and** **DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Fort Lyon, CO, Employer**	)	**Docket No. 05-1038** **Issued: December 21, 2005**

Appearances:
Antonio H. LaFore, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On April 5, 2005 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated September 7, 2004, terminating his compensation on the grounds that he refused an offer of suitable work, and a March 3, 2005 decision denying modification of the termination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation effective September 5, 2004 on the grounds that he refused an offer of suitable work under 5 U.S.C. § 8106(c).

FACTUAL HISTORY

On November 5, 1971 appellant, then a 26-year-old housekeeping aid, filed a claim for an injury occurring on October 19, 1971 in the performance of duty. He stopped work on

October 21, 1971 and did not return. The Office accepted the claim for lumbar sprain. Appellant underwent a discectomy in 1971 and fusion in 1973.

The Office attempted to vocationally rehabilitate appellant in 1976. He attended Otero Junior College with the goal of obtaining a Graduate Equivalent Degree (GED). In December 1978 the rehabilitation counselor informed the Office that appellant had enrolled in Otero Junior College every quarter beginning in the spring of 1977, but dropped out each quarter. The Office ceased rehabilitation efforts after finding that he was "unable to complete the requirements due to pain medications interfering with his concentration."

On July 18, 2003 the Office referred appellant to Dr. Jeffrey M. Hrutkay, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated August 18, 2003, he diagnosed status post discectomy at L5-S1 in 1971, status post anterior fusion at L5-S1 in 1973 and failed back syndrome. Dr. Hrutkay opined that appellant had residuals of his employment injury but could perform sedentary work with "appropriate modifications."

Based on Dr. Hrutkay's report, the Office referred appellant to a rehabilitation counselor on October 31, 2003. In a vocational rehabilitation report dated November 17, 2003, the rehabilitation counselor noted that the employing establishment had a medical clerk position for him, but that he was not willing to relocate.[1] The rehabilitation counselor related that appellant reported attending school through seventh grade, but that he was unable to read and write and "they told him he had dyslexia."

In a report dated December 22, 2003, Dr. Timothy V. Sandell, a Board-certified physiatrist and appellant's attending physician, diagnosed chronic lumbar pain, status post fusion and failed back syndrome. He opined that appellant might be able to work in a clerical position but noted that "his work restrictions do not take into account the fact that he is on chronic pain medication that may affect his alertness and cognition; therefore, he is at risk to make cognitive mistakes in a clerical position." Dr. Sandell concluded that appellant was not employable "when taking all factors into account."

On March 2, 2004 the Office referred appellant to Dr. Jeffrey J. Sabin, a Board-certified orthopedic surgeon, to resolve a conflict in medical opinion regarding his work capacity. In a report dated April 26, 2004, he reviewed the history of injury and medical reports of record. Dr. Sabin diagnosed status post lumbosacral fusion. Based on the objective findings, he opined that appellant could work 8 hours per day lifting 15 to 20 pounds. Dr. Sabin noted that appellant took 60 milligrams of OxyContin twice daily and stated, "I believe that this type of medication would make [him] a risk for making errors and being at risk in an office environment." He further found that appellant should not operate a motor vehicle. Dr. Sabin concluded that he could perform "some light-duty type work" based on the objective evidence but that "there are risks with [him] taking OxyContin and I believe that he is certainly habituated to [it] at this time. There will be clerical risks and there may be some risk taken if he operates a motor vehicle." In an accompanying work restriction evaluation, Dr. Sabin found that appellant could work eight hours per day with limitations. He noted, however, "chronic narcotics" as a factor to be considered in identifying a position for him.

[1] The location where appellant originally worked for the employing establishment, Fort Lyons, had closed.

In a note dated May 7, 2004, the Office rehabilitation specialist informed the rehabilitation counselor that the employing establishment must provide moving expenses for appellant and requested that she instruct him to select a residence near a bus line to the employing establishment as he was limited from driving.[2]

By letter dated May 13, 2004, the employing establishment offered appellant a position in Denver, Colorado as a GS-2 file clerk. The position required knowledge of the "terminal digit or alpha system filing process." The employing establishment noted that the Federal Employees' Compensation Act provided for relocation expenses after an injured employee was terminated from agency rolls.

In a letter dated May 20, 2004, the Office advised appellant that it had found the offered position suitable and that section 8106(c) of the Act provided that an employee who refused an offer of suitable work was not entitled to further compensation. The Office afforded him 30 days to accept the offer or provide reasons for his refusal.

On May 27, 2004 appellant informed the employing establishment that he "involuntary" accepted the position.

By letter dated June 7, 2004, the employing establishment notified appellant that it had "abolished the position of File Clerk, GS-2" and offered him the position of "File Clerk, GS-3." The attached position description indicated that the work required "the use of alphabetical, numerical or chronological filing."

On June 14, 2004 the rehabilitation counselor noted that appellant had accepted the position of File Clerk, GS-2. She recommended three and a half days of job coaching in order to teach him the job and stated:

> "Apparently, [appellant] has reported a seventh grade education and no GED. He has also expressed the opinion that he is learning disabled and/or dyslexic. [Appellant] reports that he has minimal reading and writing skills. Dr. Sabin indicated in his report of June 19, 2004 [that] there would be clerical risks with a return to work."

In a letter received by the Office on July 8, 2004, appellant's wife related that he could not work as a file clerk because he was illiterate, was on medicine which interfered with concentration and was in pain.

The employing establishment informed the Office on July 8, 2004 that appellant's former position as a housekeeper required the ability to read. The employing establishment attached his application for federal employment, which indicated that he had attended grade school.

By letter dated July 8, 2004, the employing establishment informed appellant that he was expected to report to work on July 12, 2004. On July 13, 2004 the employing establishment

[2] In a letter dated May 18, 2004, the rehabilitation counselor informed appellant that he should select a residence near a bus line or within walking distance of the employing establishment.

notified the Office that he did not report for work as directed and asserted that appellant had basic reading skills as he attended one year of junior college.

On July 14, 2004 the Office again advised appellant that it had found the offered position suitable and that section 8106(c) of the Act provided that an employee who refused an offer of suitable work was not entitled to further compensation. The Office afforded him 30 days to accept the offer or provide reasons for his refusal.

By letter dated July 19, 2004, the employing establishment notified appellant that he should report to work on August 16, 2004.

In a letter dated August 2, 2004, appellant's wife asserted that he required additional pain medication and was not able to read or write. She noted that the junior college indicated in an evaluation that "he was untrainable because of his medication and learning disability." Appellant's wife further contended that he was unable to live in a large city.

In a letter dated August 18, 2004, the Office determined that appellant's reasons for refusing the position were unacceptable. The Office allotted him 15 days to accept the position or have his compensation terminated.

By decision dated September 7, 2004, the Office terminated appellant's compensation effective September 5, 2004 for refusing an offer of suitable work.

On December 22, 2004 appellant, through his representative, requested reconsideration. Counsel argued that appellant read on a second grade level and noted that the Office had not obtained a functional capacity evaluation as requested by the rehabilitation counselor on February 18, 2004. He submitted the findings of a vocational evaluation which indicated that appellant was not employable as he could not read or write with "any level of proficiency to perform basic functions." Counsel also argued that it was "unrealistic" for appellant to relocate from his home of 50 years.

By letter dated January 25, 2004, the employing establishment again asserted that appellant should be able to read and write as he had attended a community college in his area. The employing establishment noted that the duties of a housekeeper, his former position, required reading and following written instructions.

By decision dated March 3, 2005, the Office denied modification of its September 7, 2004 decision. The Office found that the evidence did not establish that appellant had difficulty reading at the time of the job offer. The Office further noted that the location where he worked at the time of his injury was closed and the nearest location available to return back into the work environment was in Denver, Colorado.

LEGAL PRECEDENT

Under section 8106(c)(2) of the Federal Employees' Compensation Act, the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procure by, or secured from the employee.[3] Section 10.517 of the Office regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured 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 a determination is made with respect to termination of entitlement to compensation.[4] To justify termination of compensation, the Office must establish that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[5]

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."[6] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is properly 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.[7]

ANALYSIS

The Office accepted that appellant sustained lumbar sprain due to an October 19, 1971 employment injury. He stopped work on October 21, 1971 and did not return. The Office authorized a discectomy and lumbar fusion. The Office unsuccessfully attempted vocational rehabilitation of appellant in 1976. He attended a community college with a goal of obtaining a GED. Rehabilitation efforts subsequently ceased, however, due to his inability to complete his courses.

On March 2, 2004 the Office determined that a conflict in medical opinion existed between Dr. Hrutkay, an Office referral physician who opined that appellant could perform sedentary employment and Dr. Sandell, an attending physician who found that he was not employable, given his need for chronic pain medication. The Office properly referred appellant to Dr. Sabin to resolve the conflict in opinion. Based on Dr. Sabin's opinion, the Office determined that the position of file clerk was medically suitable for appellant.

In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is properly 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.[8]

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[3] 5 U.S.C. § 8106(c)(2) provides in pertinent part: "A partially disabled employee who … (2) refuses or neglects to work after suitable work is offered to, procured by or secured for him; is not entitled to compensation."

[4] 20 C.F.R. § 10.517.

[5] *See John E. Lemker*, 45 ECAB 258 (1993).

[6] 5 U.S.C. § 8123(a).

[7] *Glen E. Shriner*, 53 ECAB 165 (2001).

[8] *Id*.

The Board finds that the Office did not meet its burden of proof to show that the file clerk position was medically suitable. In a report dated April 26, 2004, Dr. Sabin diagnosed status post lumbosacral fusion and found that appellant could work eight hours per day with restrictions. He noted, however, that appellant's pain medication "would make [him] a risk for making errors and being at risk in an office environment." Dr. Sabin concluded that appellant could do some type of light-duty work, but reiterated that his use of OxyContin as a pain medication resulted in "clerical risks" as well as risks operating a motor vehicle. He listed his work restrictions, but noted "chronic narcotics" as a factor to consider in identifying a suitable position. Dr. Sabin did not specifically find that he had the capacity to perform the duties of the file clerk position but instead qualified his opinion that appellant could work with restrictions by noting that he was "at risk" in a clerical position due to his use of narcotics. As his opinion is equivocal in nature, it is insufficient to support that appellant could perform the work of the offered position.[9]

Additionally, the evidence submitted by the rehabilitation counselor is insufficient to establish that appellant had the necessary vocational skills to perform the duties of the position.[10] In assessing a claimant's ability to perform the selected position, the Office must consider not only physical limitations but also educational background.[11] At the time of his initial meeting with the rehabilitation counselor, appellant related that he could not read or write and that he believed that he had dyslexia. The rehabilitation counselor did not make any specific finding regarding whether he could read or write sufficiently to perform the duties of the file clerk position. Instead she merely noted his contentions to the Office rehabilitation specialist and recommended job coaching during his initial days at work. Her opinion, consequently, is insufficient to establish that appellant had the reading skills necessary to perform the duties of the position.

Consequently, as the evidence is insufficient to establish that the position was either medically or vocationally suitable for appellant, the Office did not meet its burden of proof to terminate his compensation under section 8106(c).

CONCLUSION

The Board finds that the Office did not properly terminate appellant's compensation effective September 5, 2004 on the grounds that he refused an offer of suitable work.

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[9] *See Ricky S. Storms*, 52 ECAB 349 (2001).

[10] Section 10.508 of the Office regulations provides that, "if possible the employing establishment should offer suitable employment in the location where the employee currently resides. If this is not practical, the employer may offer suitable reemployment at the employee's former duty station or other location." In this case, employment where appellant currently resided was not possible due to the closure of the facility and, thus, the employing establishment properly offered him a position at another location.

[11] *Elwanda K. Hoskins*, 33 ECAB 1344 (1982).

<u>ORDER</u>

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 3, 2005 and September 7, 2004 are reversed.

Issued: December 21, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board