United States Department of Labor
Employees' Compensation Appeals Board

BRYAN O. CRANE, Appellant	)	
and	)	**Docket No. 05-232**
	)	**Issued: September 2, 2005**
DEPARTMENT OF THE NAVY, NAVAL AIR SYSTEMS COMMAND, Patuxent River, MD, Employer	)	

Appearances:
Ann Poe Angel, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 1, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' August 20, 2004 merit decision terminating his compensation for refusing suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), 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.

FACTUAL HISTORY

On February 17, 2000 appellant, then 46-year-old systems accountant, filed a traumatic injury claim alleging that he sustained injuries on February 12, 2000 when he fell at a bowling alley while participating in a mandatory wellness program on temporary duty. Magnetic resonance imaging (MRI) scans from February 12, 2000 revealed that appellant had degenerative

disc disease and spondylosis which created spinal canal stenosis from C3-4 through C6-7 along with moderate to severe bilateral neural foraminal stenosis at the same levels. Small focal regions of signal abnormality within the adjacent spinal cord at these levels suggested an underlying myomalacia or spinal cord edema.

The Office accepted that appellant sustained aggravation of stenosis with cervical myelopathy. He stopped work on March 6, 2000 and received compensation from the Office for total disability. On March 29, 2000 appellant underwent a surgical decompression and microplate reconstruction laminoplasty at C3 through C7 which was authorized by the Office.

In June 2000 appellant began to be treated by Dr. David D. Weisher, a Board-certified neurologist. In a report dated June 19, 2000, Dr. Weisher stated that appellant complained of an electric sensation radiating from his cervical area to his chest which usually occurred upon cervical flexion. He noted that appellant's history and examination were consistent with a Brown-Sequard cervical lesion.[1]

In a report dated September 17, 2001, Dr. Weisher indicated that appellant continued to report cervical pain especially upon cervical flexion. He indicated that appellant also reported increased weakness of the left upper extremity which might be due to cervical canal stenosis and found that appellant was disabled from work.

In July 2002 the Office referred appellant to Dr. Gary A. Gallo, a Board-certified orthopedic surgeon, for an evaluation of his medical condition and disability. In a report dated July 10, 2002, Dr. Gallo noted appellant's complaints of pain when he moved his neck and of weakness in his left upper extremity. He indicated that appellant exhibited pain and limited motion upon range of cervical motion testing. Dr. Gallo diagnosed cervical spondylitic myelopathy, cervical spinal cord contusion with abnormal sensory residuals, cervical stenosis corrected with a cervical laminoplasty, and questionable instability of the cervical spine. He stated that appellant could return to his former work for six hours per day if he was able to read documents and engage in keying at eye level. Dr. Gallo also indicated that cervical flexion would have to be eliminated while working and suggested that a cervical collar might eliminate such flexion. He completed a form which detailed various work restrictions such as lifting no more than 20 pounds and not engaging in reaching for more than an hour and a half at a time.[2]

The Office requested that Dr. Gallo provide a supplemental report indicating whether appellant would be required to wear a cervical collar to eliminate cervical flexion and commenting on his ability to drive. In a report dated August 16, 2002, Dr. Gallo indicated that appellant's wearing of a soft cervical collar would not eliminate cervical flexion, but would remind him to interrupt his cervical motion before it induced pain. He posited that driving would not require a great deal of cervical flexion.

[1] In August 2000 appellant began working with a field nurse approved by the Office and he later began to participate in a vocational rehabilitation program.

[2] Dr. Gallo indicated that additional diagnostic testing might be helpful and that consideration should be given to an additional surgical procedure.

In a report dated February 3, 2003, Dr. Weisher stated that appellant's history and examination were consistent with a Brown-Sequard cervical lesion and noted that he had consistently experienced pain upon cervical motion since his February 12, 2002 employment injury. Dr. Weisher stated that during all examinations appellant has exhibited a Lhermitte's sign, *i.e.*, cervical pain, upon movement of his neck. He indicated that wearing a rigid cervical collar could worsen appellant's condition by causing atrophy and concluded that appellant was virtually unemployable.

In early February 2003, appellant worked at the employing establishment for four days in a modified systems accountant position. He stopped work after indicating that he could not physically perform the position. Appellant spent most of his time participating in orientation sessions and arranging for installation of a voice-activated computer.

In June 2003 the Office determined that there was a conflict in the medical evidence between Dr. Weisher and Dr. Gallo regarding appellant's ability to work and referred him to Dr. Mark B. Gerber, a Board-certified neurosurgeon, for an impartial medical examination. The Office advised Dr. Gerber that, if appellant returned to work, his workstation would be modified to include a voice-activated computer system, a high/low work table, a sitting/standing stool, a hands-free telephone set, a document holder, an elevated reading and writing surface, and a standing rotating file cabinet.

In a report dated July 15, 2003, Dr. Gerber reported the findings of his examination and diagnosed status post spinal cord injury with remaining Brown-Sequard type deficits, persisting symptoms related to cervical flexion, and questionable C1-2 instability. He stated that appellant would not perform cervical flexion because he asserted that it would cause a recurrence of Lhermitte's phenomenon and numbness in the left side of his face. Dr. Gerber noted that appellant was able to extend his head completely and turn his head from side to side with mildly decreased range of motion and indicated that he had no cervical lymphadenopathy. He stated that appellant had permanent impairments due to his work injury but that he would be able to return to work in some capacity. Dr. Gerber noted that he was concerned about appellant's ongoing symptoms referable to his cervical flexion and recommended that he undergo MRI scan testing to evaluate whether he had ongoing cervical syringomyelia or stenosis. He stated that, if the MRI scan testing did not obtain adequate imaging, a myelogram would likely be required. Dr. Gerber indicated that, if decompression was adequate, flexion and extension, x-ray testing was recommended to check for instability between C1 and C7. He concluded that, if there was no evidence of instability or further cord compression, appellant could return to work in some capacity based on a functional capacity evaluation.

In August 2003 the Office requested that Dr. Gerber submit a supplemental report after appropriate diagnostic testing was carried out. The findings of MRI scan testing obtained on September 15, 2003 showed a small right paracentral disc bulge at C2-3 with uncal vertebral hypertrophy that might create slight narrowing of the right foramina; degenerative changes at C3-4 with uncal vertebral hypertrophy and facet arthropathy that might create very mild bilateral osseous narrowing; degenerative changes at C4-5 with bilateral facet arthropathy and hypertrophy of ligamentum flavum creating slight foraminal narrowing; degenerative changes at C5-6 without prominent compromise of central canal or foramina; degenerative changes in disc space at C6-7 with a small amount of uncal vertebral hypertrophy and facet arthropathy that

might create slight narrowing of the left foramina; small right paracentral disc bulge at T1-2 that might create narrowing of the right foramina; and an area of increased posterior signal posterior to the cervical cord, possibly consistent with a previous cervical cord contusion.[3]

The results of a functional capacity evaluation on October 1, 2003 at Dr. Gerber's office showed that appellant reported pain in his right shoulder and in his cervical region extending into his thoracic spine when he performed cycles of lifting various weights. It was concluded that appellant could occasionally lift up to 60 pounds and frequently lift up to 45 pounds.

In a report dated October 21, 2003, Dr. Gerber noted that he had a chance to review appellant's records, including the recent MRI scan testing and functional capacity evaluation. He stated:

> "Unfortunately, with the degree of spinal cord injury and his symptoms which are related to cervical positioning, I feel that he is totally and permanently disabled with a greater than 21 percent whole body impairment rating per the 1996 Florida Uniform Permanent Impairment Rating Schedule. Even with the results of the functional capacity evaluation, I do not feel that it is safe for him to perform the lifting which was recommended.
>
> "Again, despite my initial impression that he would be able to return to work, I am very concerned after further examining the MRI [scan] and considering his reproduction of symptoms with motion."

In December 2003 the Office provided Dr. Gerber with further information regarding the job the employing establishment intended to offer appellant, including more details regarding the modification of appellant's workplace and an expanded job description indicating that appellant would work 6 hours per day, would be restricted from lifting more than 10 pounds, and would receive a 15-minute break every hour. The Office requested that Dr. Gerber clarify his earlier reports in light of this information.

In a report dated January 6, 2004, Dr. Gerber stated that appellant sustained a permanent injury with permanent disability and indicated, "My main concern is that with motion, he has exacerbation of his symptoms." He reviewed the position description, including the work restrictions of lifting no more than 10 pounds with a 15-minute break every hour, as well as the planned modifications to appellant's workstation. He stated, "In my medical opinion, I feel he is able to perform assisted activities such as described, even with his disability."

In March 2004 the employing establishment offered appellant a job as a modified systems accountant for six hours per day. The job involved the development, modification and implementation of financial systems and related policies and procedures. It did not require lifting more than 10 pounds and allowed appellant to take 15-minute breaks every hour.[4]

[3] The record also contains a September 16, 2003 MRI scan of appellant' cervical spine which contains similar findings.

[4] The description suggested that appellant would be required to travel to field offices.

Appellant's workstation was to be modified to include a voice-activated computer system, a work table which could be adjusted between low and high positions, a stool which could be adjusted between low and high low positions, a hands-free telephone set, a document holder which would allow raising of documents to eye level, an adjustable reading and writing surface which would allow raising of larger documents to eye level, and standing rotating file cabinet which would eliminate the need to reach down low for files.[5]

On April 15, 2004 appellant refused the modified systems accountant position offered by the employing establishment. He asserted that he had not received adequate assurance that the voice-activated computer would be adequate for his purposes and claimed that the employing establishment did not address his questions about whether he would be required to wear a rigid cervical collar at work.

By letter dated April 30, 2004, the Office advised appellant of its determination that the modified systems accountant position offered by the employing establishment was suitable. The Office informed appellant that he had 30 days to provide good cause for refusing the position in order to avoid termination of his compensation.

By letter dated May 28, 2004, appellant argued that he was not capable of performing the modified systems accountant position offered by the employing establishment. He asserted that the reports of Dr. Gerber showed that he could not flex his neck without experiencing strong pain and that he had permanent disability which prevented him from performing the position. Appellant claimed that the voice-activated computer would not work in his noisy work environment and alleged that the other alterations to his workstation identified by the employing establishment would not prevent him from flexing his neck. He alleged that he could not physically handle the rigors of travel to field offices and asserted that the Office did not address his earlier concerns that he would be required to wear a rigid cervical collar at work.

In a statement dated June 22, 2004, Mary Vaughan, the administrator of the employing establishment's injury compensation program, addressed appellant's concerns. She stated that appellant's work space was not unusually noisy and would not prevent his voice-activated computer from working. Ms. Vaughan noted that appellant would not be required to travel if he was not medically capable and that travel time had been significantly reduced through the use of teleconferences.

Appellant submitted numerous treatment notes dated between February 2002 and July 2004 of Dr. Levin Ratliff and Dr. Thomas Sievert, two attending chiropractors.[6]

[5] These accommodations were based on appellant's medical restrictions and the recommendations of an attending physical therapist who previously had performed an ergonomic assessment. The employing establishment stated that all the modifications were in place except for the voice-activated computer which required appellant's presence to install.

[6] He also submitted medical reports which were previously in the record, including a September 17, 2001 report of Dr. Weisher and an August 21, 2002 report of Dr. Edward F. Steinmetz, a Board-certified neurologist to whom he was referred by his insurance company.

By letter dated July 30, 2004, the Office advised appellant that his reasons for refusing the offered position were unacceptable and that he had 15 days to accept the position in order to avoid termination of his compensation. The Office indicated that appellant's concerns regarding the modification of his workstation and the travel requirements of the job were unfounded.

By decision dated August 24, 2004, the Office terminated appellant's compensation effective September 5, 2004 on the grounds that he refused an offer of suitable work.[7]

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees' Compensation Act 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."[8] However, to justify such termination, the Office must show that the work offered was suitable.[9] 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.[10]

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."[11] 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.[12] 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.[13]

ANALYSIS

On February 12, 2000 appellant sustained aggravation of stenosis with cervical myelopathy due to a fall and the Office paid compensation for periods of disability. By decision dated August 24, 2004, the Office terminated appellant's compensation effective September 5, 2004 on the grounds that he refused an offer of suitable work. The Office found that the opinion of Dr. Gerber, a Board-certified neurosurgeon who served as an impartial medical specialist,

[7] The Office first issued an August 20, 2004, decision terminating appellant's compensation due to his refusal of suitable work, but indicated that the August 24, 2004 decision superceded the August 20, 2004 decision.

[8] 5 U.S.C. § 8106(c)(2).

[9] *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

[10] 20 C.F.R. § 10.124; *see Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

[11] 5 U.S.C. § 8123(a).

[12] *William C. Bush*, 40 ECAB 1064, 1075 (1989).

[13] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

showed that the modified systems accountant position offered by the employing establishment was suitable.

The Board finds that the Office did not meet its burden of proof to show that the modified systems accountant position was suitable and therefore did not meet its burden of proof to terminate appellant's compensation.

The Office properly found that there was a conflict in the medical evidence regarding appellant's ability to work between Dr. Weisher, an attending Board-certified neurologist, and Dr. Gallo, a Board-certified orthopedic surgeon who served as an Office referral physician. In a report dated February 3, 2003, Dr. Weisher stated that appellant experienced significant cervical pain and concluded that he was virtually unemployable. In contrast, Dr. Gallo concluded in reports dated July 10 and August 16, 2002 that appellant could return to his former work for six hours per day if some accommodations were made to his workplace. The Office then properly referred appellant to Dr. Gerber, a Board-certified neurosurgeon, for an impartial medical examination and an opinion on his ability to work.

The Board finds that the opinion of Dr. Gerber is not sufficiently well rationalized to represent the weight of the medical evidence with respect to appellant's ability to work.

In a report dated July 15, 2003, Dr. Gerber diagnosed status post spinal cord injury with remaining Brown-Sequard type deficits, persisting symptoms related to cervical flexion, and questionable C1-2 instability and stated that appellant had permanent impairments due to his work injury but that he would be able to return to work in some capacity. Dr. Gerber noted that he was concerned about appellant's ongoing symptoms referable to his cervical flexion and recommended that he undergo additional testing, to include MRI scan testing, to evaluate whether he had ongoing cervical syringomyelia or stenosis. He concluded that if there was no evidence of instability or further cord compression appellant could return to work in some capacity based on a functional capacity evaluation.

The Office then authorized the performance of additional testing and requested that Dr. Gerber produce a supplemental report after reviewing the findings of this testing. The findings of MRI scan testing obtained on September 15, 2003 revealed various degrees of disc bulging and degenerative disease at C2-3 through T1-2 with central canal and foramina involvement and signs of a possible cervical cord contusion. The results of an October 1, 2003 functional capacity evaluation showed that appellant reported pain in his right shoulder and in his cervical region extending into his thoracic spine when he performed cycles of lifting various weights.

In a report dated October 21, 2003, Dr. Gerber stated that he had a chance to review the recent MRI scan testing and functional capacity evaluation and stated, "Unfortunately, with the degree of spinal cord injury and his symptoms which are related to cervical positioning, I feel that he is totally and permanently disabled…. Even with the results of the functional capacity evaluation, I do not feel that it is safe for him to perform the lifting which was recommended." Dr. Gerber stated that, despite his initial impression that appellant would be able to return to work, he was "very concerned after further examining the MRI [scan] and considering his reproduction of symptoms with motion."

The Office thereafter provided Dr. Gerber with further information regarding the job the employing establishment intended to offer appellant, including an expanded job description indicating that appellant would work 6 hours per day, would be restricted from lifting more than 10 pounds, and would receive a 15-minute break every hour. The Office requested that Dr. Gerber clarify his earlier reports in light of this information.

In response, Dr. Gerber produced a January 6, 2004 report in which he stated that appellant had permanent disability and indicated that he was concerned that he experienced an exacerbation of his symptoms with movement. He noted that he had reviewed the materials provided by the Office, including the description of duties and workplace accommodations, and stated, "In my medical opinion, I feel he is able to perform assisted activities such as described, even with his disability."

Although Dr. Gerber concluded that appellant could now perform the type of position that the employing establishment ultimately offered in March 2004, he did not provide sufficient medical rationale to support this opinion. In his January 6, 2004 report, he did not adequately address the questions and concerns that he posed in his earlier two reports. For example, Dr. Gerber noted in his July 15, 2003 report that he had concerns about appellant's ongoing symptoms referable to his cervical flexion and about whether he had ongoing cervical syringomyelia, stenosis, instability or cord compression. He indicated that obtaining additional diagnostic testing would help address these questions and answer the ultimate question of whether appellant could return to work. Dr. Gerber did not, however, address any of these matters in his January 6, 2004 report. Although he obtained MRI scan testing on September 15, 2003 and expressed concerns about the results of this testing in his October 21, 2003 report, he did not provide any notable analysis of this testing or indicate whether it showed that appellant had cervical syringomyelia, stenosis, instability or cord compression.

In his October 21, 2003 report, Dr. Gerber indicated that he was concerned that the functional capacity evaluation showed that appellant experienced cervical pain when engaging in lifting and concluded that he was totally and permanently disabled. In his January 6, 2004 report, he did not provide any explanation for why he apparently no longer had such concerns. In fact, Dr. Gerber did not provide any discussion of whether appellant continued to experience cervical pain upon activity which would interfere with his ability to work or otherwise explain why he changed his opinion, expressed on October 21, 2003, that appellant was completely disabled. In his January 6, 2004 report, he merely provided a brief, unexplained statement that appellant could perform the type of work that the employing establishment later offered him.

Given that Dr. Gerber's opinion is not sufficiently well rationalized to resolve the conflict in the medical evidence regarding appellant's ability to perform the position offered by the employing establishment, there is an unresolved conflict regarding this matter. The Office relied on the reports of Dr. Gerber to determine that the position was suitable and then to terminate appellant's compensation based on his refusal of the position. The Office failed to meet its burden of proof in terminating appellant's benefits.[14]

[14] *See Gail D. Painton*, 41 ECAB 492, 498 (1990).

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation effective September 5, 2004 on the grounds that he refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' August 20, 2004 decision is reversed.

Issued: September 2, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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