United States Department of Labor
Employees' Compensation Appeals Board

ANTHONY J. TRAVALINE, Appellant	)	
and	)	**Docket No. 06-260**
	)	**Issued: July 12, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Conhoshocken, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, 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

JURISDICTION

On November 14, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' hearing representative's decision dated November 7, 2005 which affirmed the Office's November 5, 2004 decision, terminating appellant's compensation on the grounds that 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 merits of this case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation effective November 27, 2004 on the grounds that he refused an offer of suitable work.

FACTUAL HISTORY

On February 4, 2003 appellant, then a 49-year-old mail carrier, filed a traumatic injury claim alleging that on February 1, 2003 his vehicle was hit by another vehicle while in the performance of duty. Appellant had internal injuries and was admitted into critical care for three days. Appellant stopped work on February 1, 2003. The Office accepted the claim for spleenic contusion, subcutaneous and muscular hematoma, contusion of the back, and a fractured rib and

paid appellant appropriate compensation benefits. The Office expanded the claim to include bilateral carpal tunnel syndrome.

On May 15, 2003 appellant underwent an ultrasound guided aspiration of left subcutaneous hematoma, which was performed by Dr. Harry Polsky, a Board-certified vascular surgeon.

In a May 14, 2003 report, Dr. Bruce J. Menkowitz, a Board-certified orthopedic surgeon, and treating physician, diagnosed cervical and lumbar strain, nerve root compression cervical spine, hematoma flank, contusion left flank and contusion of the spleen and ordered diagnostic studies. He noted that a magnetic resonance imaging (MRI) scan of the cervical spine showed disc desiccation and protrusions and that an MRI scan of the lumbar spine showed disc protrusion and bulging. In addition, the physician noted that electromyography scan and nerve conduction studies (EMG/NCS) showed evidence of bilateral carpal tunnel syndrome. Dr. Menkowitz advised that he was "concerned that appellant may have contused the carpal tunnel with the steering wheel at the time of the accident." He opined that appellant had evidence of preexisting degenerative changes of his neck and low back and that appellant's disc herniations were secondary to the accident.

The Office continued to develop the claim and by letter dated July 8, 2003 referred appellant to Dr. Steven Valentino, a Board-certified orthopedic surgeon, for a second opinion examination.

In a July 29, 2003 report, Dr. Valentino described appellant's history of injury and treatment, which included a nonwork-related lumbosacral strain and sprain 10 years ago and a history of carpal tunnel syndrome. He conducted a physical examination and provided findings which included that appellant had normal strength, normal spinal curves, no evidence of myelopathy, full range of motion and no evidence of soft tissue abnormality. Dr. Valentino advised that appellant's hematoma of the left flank had resolved and that he had a healed rib fracture. He also indicated that there was no diagnosis of a herniated disc about the cervical spine or lumbar spine which was related to the employment injury, as they only revealed degenerative changes. Dr. Valentino opined that appellant had no ongoing disability or impairment causally related to the February 1, 2003 work injury. He also indicated that appellant's carpal tunnel syndrome bore no causal connection to the work injury and opined that appellant was capable of returning to his date-of-injury position without restrictions.

By letter dated August 27, 2003, the Office provided a copy of the second opinion report from Dr. Valentino to appellant's treating physicians, Drs. Menkowitz and Ramsey. The Office requested that they provide an opinion regarding appellant's ability to return to work, including any objective findings.

In an August 18, 2003 disability certificate, Dr. Steven Katz, a Board-certified urologist and treating physician, determined that appellant could return to full duty on August 25, 2003.

In an August 27, 2003 treatment note, Dr. Menkowitz advised that appellant continued to have pain in his neck and low back, although his hematoma had resolved and recommended additional physical therapy.

In an attending physician's report dated September 16, 2003, Dr. Menkowtiz diagnosed "cervical lumbosacral strain, nerve root compression of the cervical spine, and hematoma flank/back, spleen." He checked the box "yes" in response to whether he believed appellant's condition was caused or aggravated by an employment activity and added that appellant had "no other symptoms before accident." The physician determined that appellant was totally disabled from May 14, 2003 to the present.

On October 9, 2003 the Office referred appellant along with a statement of accepted facts and the medical record to Dr. Barry A. Silver, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve the medical conflict between Dr. Menkowitz, who opined that appellant was totally disabled and Dr. Valentino, the second opinion physician, who opined that appellant could return to full duty on July 29, 2003.

In treatment notes dated October 15, 2003, Dr. Menkowitz advised that appellant could return to work part time, for three to four hours per day. He indicated that appellant should not use the right arm, or do any lifting and that he should only do sedentary work with walking for two to three minutes every half hour.

In an October 31, 2003 report, Dr. Silver noted appellant's history of injury and treatment Dr. Silver opined that appellant had multiple injuries following his motor vehicle accident, including a possible concussion, spleenic injury, a hematoma of the flank and a fractured rib. He also noted that appellant had a cervical disc injury superimposed on degenerative changes. Dr. Silver advised that the degenerative changes preceded the incident, but that appellant also had protrusions that could be related to the incident. He indicated that appellant had multiple level lumbar disc disease with superimposed trauma and opined that it was unlikely to require surgery. Dr. Silver also noted that appellant had right carpal tunnel syndrome that he suspected was "post traumatic." He opined that appellant's cervical disc syndrome with axial pain without radiculopathy, lumbar disc syndrome without radiculopathy and right carpal tunnel syndrome were work related. Dr. Silver added that appellant was "capable of certain work activity." He opined that appellant could return to sedentary work and recommended a functional capability evaluation (FCE). Dr. Silver also completed a work capacity evaluation and advised that appellant could do sedentary work eight hours a day. He advised limitations on all activities, and opined that appellant's carpal tunnel symptoms as well as some of his ongoing neck and back problems were causally related to the work injury. Dr. Silver indicated that he did not believe that appellant was capable of returning to his regular work activity.

By letter dated December 2, 2003, the Office requested that the employing establishment provide appellant with a light-duty position based upon the restrictions of the impartial medical examiner.

By letter dated December 18, 2003, Dr. Silver was asked to provide additional information regarding appellant's present work restrictions.

In a follow-up report dated December 30, 2003, Dr. Silver specified that appellant "should be on a restricted program of activity and that would include the position that would be called sedentary duty." He advised that "this would include the ability to lift about 0 to 10 pounds and occasionally do some sitting, walking and standing." Dr. Silver noted that

appellant's lifting should be confined to no more than 10 pounds. He opined that there was no reason why appellant could not "lift a [tele]phone to answer telephones in a sedentary duty position." Dr. Silver concluded that appellant could perform sedentary work.

In a March 9, 2004 report, Dr. Menkowitz indicated that appellant had a new episode of pain in the left side and reviewed a February 17, 2004 MRI scan of the lumbar spine. He noted a disc protrusion at L4-5 and a bulging disc at L5-S1.

A March 9, 2004 MRI scan of the cervical spine, read by Dr. Richard Chesnick, a Board-certified diagnostic radiologist, revealed "small extradural defects," and advised that they had not "changed appreciably when accounting for technical variations."

In a March 15, 2004 report, Dr. Andrew Freese, a Board-certified neurological surgeon, noted appellant's history of injury and treatment and advised that appellant was a candidate for injections in the cervical and lumbar regions.

In a March 30, 2004 treatment note, Dr. Menkowitz noted that there were distinct changes in the cervical and lumbar areas.

On April 19, 2004 appellant began to treat with Dr. John Park, a Board-certified anesthesiologist and pain specialist, who recommended spinal injections.

On May 5, 2004 the employing establishment offered appellant a limited-duty job based on Dr. Silver's work restrictions. The duties consisted of answering the telephone and taking appropriate action, verbally informing and directing customers in the lobby as needed, and other duties as directed within physical restrictions. Dr. Silver's requirements of the position were answering the telephone, occasional sitting, walking and standing, and lifting up to 10 pounds.

In a letter dated May 14, 2004, the employing establishment advised the Office that appellant refused the modified job offer.

In an office note dated July 20, 2004, Dr. Menkowitz indicated that the claimant made an attempt to return to work, but due to pain, he had to leave.

In a treatment note dated July 21, 2004, Dr. Park opined that, with appellant's pain coming from two different pathologies, he did not see how appellant could work as a mailman.

By letter dated August 18, 2004, the Office advised appellant that the modified letter carrier position had been found to be suitable to his capabilities and was currently available. The Office indicated that the impartial medical examiner, Dr. Silver had examined appellant on October 31, 2003 and provided work restrictions that were consistent with the offered position. Appellant was advised that he should accept the position or provide an explanation for refusing the position within 30 days. Finally, the Office informed appellant that, if he failed to accept the offered position and failed to demonstrate that the failure was justified, his compensation would be terminated.

In an August 12, 2004 report, Dr. Park opined that appellant had cervical and lumbar disc protrusion causing radiculopathy. He opined that continued injections would not be of any benefit; however, he opined that therapy would be beneficial.

In a letter dated September 16, 2004, appellant alleged that he continued to have physical problems and could not stand or sit for very long. He alleged that on May 5, 2004 he went back to work "against his doctor's wishes and got humiliated and sent home by the postmaster." Appellant indicated that, since that time, his problems had worsened.

In a September 28, 2004 treatment note, Dr .Menkowitz noted that appellant had "short relief from treatment by Dr. Park…." He opined that appellant continued to have pain in his neck and back and recommended treatment with a neurosurgeon.

By letter dated October 15, 2004, the Office informed appellant that his reasons for refusing the position were not acceptable and allowed an additional 15 days for appellant to accept the position. Appellant was advised that the weight of the medical evidence rested with Dr. Silver, the impartial medical examiner. He was advised that no further reason for refusal would be considered.

By decision dated November 3, 2004, the Office terminated appellant's entitlement to monetary compensation benefits, effective November 27, 2004, on the basis that appellant had refused suitable work. The Office determined that the report of Dr. Silver, the impartial medical examiner, represented the weight of the evidence.

Appellant subsequently submitted an October 7, 2004 report from Dr. Park indicating that appellant had cervical and lumbar disc protrusion and radiculopathy symptoms. Dr. Park advised that appellant had injection therapy without much benefit and recommended that appellant lose weight. He continued to submit reports and recommend treatment.

In a November 16, 2004 report, Dr. Menkowitz advised that he agreed with Dr. Silver's work capacity evaluation, with the addition that appellant was able to lie down if he had significant pain. He noted that appellant had been referred to Dr. Stephen E. Sacks, a neurologist, and a pain management clinic with Dr. John Park, a physician, and opined that appellant continued to have pain in his neck and back.

In a December 21, 2004 report, Dr. Sacks advised that appellant was seen for consultation on December 13, 2004. He examined appellant and noted that neurological and cranial examinations were normal. Dr. Sacks diagnosed cerebral concussion by history with significant herniated disc disease and recommended an EMG and nerve conduction study. In a January 20, 2005 report, he advised that the EMG and nerve conduction studies were consistent with significant L4-5 radiculopathy involving the left lower extremity with emphasis at L4 on the left side. Dr. Sacks also noted elements of S1 pathology and evidence of C6-7 nerve root involvement of a significant degree involving the left upper extremity with the emphasis at C6 on the left side. He continued treating appellant and submitting reports.

By letter dated March 17, 2005, appellant's representative requested a hearing. On July 26, 2005 appellant's representative subsequently requested that a review of the written record be conducted in lieu of an oral hearing.

The Office also received hospital records dating from January to February 2005 for back and cervical pain.

In an April 6, 2005 report, Dr. Sacks diagnosed chronic L4-5 radiculopathy involving the left lower extremity and concomitant C6-7 radiculopathy involving the left upper extremity and opined that this would result in life long symptoms in the cervical and lumbar areas. He continued to submit reports.

In a May 13, 2005 report, Dr. Shailen Jalali, a Board-certified anesthesiologist, opined that appellant continued to have cervical and lumbar disc protrusion and radicular symptoms.

By letter dated August 25, 2005, the Office requested that the employing establishment provide any comments.

In an August 31, 2005 report, Dr. Sacks diagnosed chronic cervical C6-7 nerve root involvement of the left upper extremity with concomitant L4-5 nerve root involvement of the left lower extremity and continued with permanent impairment in terms of performing his work duties as a mail carrier as a result of injuries from February 1, 2003."

By decision dated November 7, 2005, the Office hearing representative affirmed the Office's November 5, 2004 decision.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits.[1] This includes cases in which the Office terminates compensation under section 8106(c)(2) of the Act for refusal to accept suitable work.

Section 8106(c)(2)[2] of the Act provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee is not entitled to compensation. Section 10.517(a)[3] of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured for him or her has the burden to show that this refusal or failure to work was reasonable or justified After providing the two notices described in section 10.516,[4] the Office will terminate the employee's entitlement to further compensation under 5 U.S.C. §§ 8105, 8106, and 8107, as provided by 5 U.S.C. § 8106(c)(2). However, the employee remains entitled to medical benefits as provided by 5 U.S.C. § 8103 or justified. To justify termination, the Office must show that the work offered was suitable,[5] and must inform appellant of the consequences of refusal to

[1] *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

[2] 5 U.S.C. § 8106(c)(2).

[3] 20 C.F.R. § 10.517(a).

[4] 20 C.F.R. § 10.516.

[5] *See Carl W. Putzier*, 37 ECAB 691 (1986); *Herbert R. Oldham*, 35 ECAB 339 (1983).

accept such employment.[6] According to Office procedures, certain explanations for refusing an offer of suitable work are considered acceptable.[7] Unacceptable reasons include appellant's preference for the area in which he resides; personal dislike of the position offered or the work hours scheduled; lack of promotion potential or job security.[8]

ANALYSIS -- ISSUE 1

In this case, the Office properly found that Dr. Menkowitz disagreed with an Office referral physician, Dr. Valentino, as to whether appellant was totally disabled due to his accepted condition. The Office properly found a conflict in medical evidence which required a referral to an impartial medical specialist for resolution.

The Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is a 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."

The Office referred appellant to Dr. Silver for an impartial medical evaluation to resolve the conflict in opinion. Dr. Silver performed a thorough evaluation of appellant. He provided a reasoned opinion that appellant was capable of working eight hours a day, in a limited capacity. Dr. Silver provided restrictions, for sedentary duty. He advised that "this would include the ability to lift about 0 to 10 pounds and occasionally do some sitting, walking and standing." Dr. Silver noted that appellant's lifting should be confined to no more than 10 pounds. He opined that there was no reason why appellant could not "lift a [tele]phone to answer telephones in a sedentary-duty position." When a case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical opinion, the opinion of such specialist, if sufficiently well rationalized and based on a proper background, must be given special weight.[9] Dr. Silver's opinion represented the weight of the medical evidence on the issue of appellant's ability to work and establishes that appellant was capable of working eight hours per day in a sedentary position.

Subsequent to the evaluation by Dr. Silver, the employing establishment offered appellant a sedentary position which accommodated the work restrictions given by Dr. Silver. The Office reviewed the position and found it to be suitable for appellant.

To properly terminate 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.[10] The Office properly followed its

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[6] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(d)(1).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(1)-(5).

[8] *Arthur C. Reck*, 47 ECAB 339 (1996); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(c) (July 1996).

[9] *Kathryn Haggerty*, 45 ECAB 383, 389 (1994); *Jane B. Roanhaus*, 42 ECAB 288 (1990).

[10] *See Maggie L. Moore*, *supra* note 6.

procedural requirements in this case. By letter dated August 18, 2004, the Office advised appellant that the position was suitable and provided him 30 days to accept the position or provide reasons for his refusal. The Office further notified him that the position remained open, that he would be paid for any difference in pay between the offered position and his date-of-injury job, that he could still accept without penalty and that a partially disabled employee who refused suitable work was not entitled to compensation.

By letter received by the Office on September 16, 2004, appellant refused the position because he had pain that prevented him from working. The Office must consider preexisting and subsequently acquired conditions in determining the suitability of an offered position.[11] In this case, however, appellant did not submit sufficient medical evidence to establish that his condition would prevent him from performing the sedentary position.

By letter dated October 15, 2004, the Office properly informed appellant that his reasons for refusing the offered position were unacceptable and provided him 15 days to accept the position. He refused to do so and thus the Office properly terminated his wage-loss compensation for refusal of suitable work. At the time of the termination, the weight of the medical evidence established that appellant could perform the duties of the offered position.

An employee who refuses or neglects to work after suitable work has been offered to him or her has the burden of showing that such refusal to work was justified.[12] In the present case, appellant has not shown that his refusal to work was justified. The weight of the medical evidence continues to support that appellant's accepted conditions did not prevent him from performing the job he was offered in May 2004. The medical reports received subsequent to the evaluation by Dr. Silver, are insufficient to either overcome Dr. Silver's opinion or create a new conflict in the medical evidence.

Dr. Menkowitz merely repeated his previously expressed opinion that appellant was unable to work due to his symptoms, which was part of the conflict in medical opinion for which appellant was referred to Dr. Silver.[13] Furthermore, in his March 9, 2004 report, while he noted pain on the left side and a disc protrusion at L4-5 and a bulging disc at L5-S1, he did not provide any opinion with respect to appellant's ability to perform the suitable work position. His July 30, 2004 treatment note, merely noted pain and again did not offer an explanation regarding appellant's ability to perform the offered position. Furthermore, in his November 16, 2004 report, Dr. Menkowitz, concurred with Dr. Silver on appellant's work restrictions if appellant could lie down if he had pain.

Dr. Park began treating appellant and, although he noted that appellant had pain and recommended spinal injections, he did not specifically address whether and how appellant's

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

[12] 5 U.S.C. § 8106(c)(2).

[13] Submitting a report from a physician who was on one side of a medical conflict that an impartial specialist resolved is, generally, insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict. *Jaja K. Asaramo*, 55 ECAB ___ (Docket No. 03-1327, issued January 5, 2004).

accepted conditions prevented him from performing the limited-duty position he was offered. He did not provide any findings and rationale to support that appellant would have been unable to perform the limited-duty position during the time period it was offered and available to him.[14] Other medical reports submitted by appellant did not provide a specific opinion regarding appellant's ability to perform the offered position.

Following the termination of his benefits, appellant has not established that the offered position was outside of his physical recommendations. The Board finds that appellant did not meet his burden to show that his refusal to accept suitable work was justified.

Appellant's representative also alleged that the report of Dr. Silver could not be relied upon as the report was not current. He referred to the case of *Charles Wofford*.[15] In that case, the medical report, on which the termination of benefits under section 8106(c) was based, was over a year old. The Board reversed, finding that the medical evidence did not establish that the offered job was within appellant's work restrictions while also noting the age of the report and also that the record was not clear on the duties of the offered position. However, neither *Wofford* nor any other Board precedent specifically holds that a medical report more than one year old is insufficient to support a termination of compensation for refusing suitable work. In *Wofford*, factors other than the age of the medical report, *i.e.*, the duties of the offered position were unclear, were considered in determining whether the Office had met its burden of proof. In any event, in the present case, Dr. Silver's most recent report was issued on December 30, 2003 and the Office terminated benefits in a November 3, 2004 decision, less than a year. Thus, appellant's argument that the medical evidence was stale is not probative. As noted above, Dr. Silver's report represented the weight of the medical evidence regarding appellant's work restrictions at the time the Office terminated monetary benefits due to appellant's refusal of an offer of suitable work. After this termination, appellant did not submitted sufficient medical evidence justifying his refusal suitable work.

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits effective November 27, 2004 and that appellant did not, thereafter, establish that his refusal of suitable work was justified.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation effective November 27, 2004 on the grounds that he refused an offer of suitable work.

[14] In order to establish causal relationship, a physician's report must present rationalized medical opinion evidence, based on a complete factual and medical background; *see Kathryn Haggerty*, *supra* note 9. Rationalized medical evidence is evidence which relates a work incident or factors of employment to a appellant's condition, with stated reasons of a physician; *see Gary L. Fowler*, 45 ECAB 365 (1994)

[15] Docket No. 96-1823 (issued June 22, 1998). He also referred to *Victor I. Holloway*, Docket No. 02-69 (issued June 19, 2002) (where the Board, in footnote cited to *Wofford* for the proposition that it would consider only contemporaneous medical evidence regarding appellant's ability to perform an offered position).

ORDER

IT IS HEREBY ORDERED THAT the November 7, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 12, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board