United States Department of Labor
Employees' Compensation Appeals Board

ERIC ALEXANDER, Appellant	)	
and	)	**Docket No. 06-581**
	)	**Issued: July 10, 2006**
DEPARTMENT OF THE ARMY, RED RIVER ARMY DEPOT, Texarkana, TX, Employer	)	

Appearances:
Charles L. Attaway, 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 January 17, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decisions dated July 27 and November 8, 2005. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation on the grounds that he refused an offer of suitable work; (2) whether appellant received an overpayment in compensation in the amount of $3,168.96 for the period August 7 through November 1, 2005; and (3) whether the Office properly determined that appellant was at fault in accepting an overpayment and was therefore not entitled to waiver.

FACTUAL HISTORY

On January 14, 2004 appellant, then a 35-year-old heavy mobile equipment repairer, sustained an employment-related cervical radiculitis, cervical spondylosis and displacement of cervical intervertebral disc. He stopped work and was placed on the periodic rolls. Appellant

came under the care of Dr. Freddie L. Contreras, Board-certified in neurosurgery. On April 7, 2004 he performed a three-level discectomy from C4 to C7. In a treatment note dated August 27, 2004, Dr. Contreras reported appellant's complaints of upper back pain and leg numbness and weakness. A December 20, 2004 magnetic resonance imaging (MRI) scan of the cervical spine demonstrated postoperative findings and a small central disc protrusion at C2-3. On December 23, 2004 Dr. Contreras noted cervical and thoracic spine MRI scan findings and appellant's complaint of mid-back pain and right knee numbness which caused him to fall. Motor examination demonstrated mild diffuse weakness. He advised that appellant could not work. In reports dated February 1, 2005, Dr. Contreras noted appellant's complaint of right knee pain, recommended a cervical myelogram and MRI scan of the right knee and advised that appellant could return to work four hours per day with restrictions. On February 8, 2005 appellant returned to limited duty for four hours per day but stopped work again on February 24, 2005 and did not return.

By letter dated February 24, 2005, the Office referred appellant, together with a statement of accepted facts, the medical record and a set of questions, to Dr. J. Stuart Crutchfield, a Board-certified neurosurgeon, for a second opinion evaluation.

In a treatment note dated February 24, 2005, Dr. Contreras advised that he took appellant off work due to the severe nature of his neck pain. He recommended cervical and thoracic myelography. A March 11, 2005 cervical myelogram with computerized tomography (CT) demonstrated straightening of the normal lordotic curve of the cervical spine and a mild to moderate anterior extradural defect upon the thecal sac at the C3-4 level. In March 22, 2005 reports, Dr. Contreras noted his review of the myelogram and CT examinations. He diagnosed cervical spondylitic disease with congenitally narrowed cervical canal and thoracic disc disease with spondylitic changes at several levels in the upper thoracic spine, which he opined was part of the original injury. Dr. Contreras advised that appellant could never return to work as a heavy equipment mechanic and at that time was totally disabled because his fusion was not solid.

In a report dated March 29, 2005, Dr. Crutchfield noted his review of the record and examination findings. He reported that a postoperative December 20, 2004 MRI scan of the cervical spine demonstrated that the bone grafts were in good position with some residual spinal stenosis secondary to a probable congenitally small spinal canal. A December 21, 2004 thoracic spine MRI scan demonstrated modest thoracic spondylosis with no spinal cord or neural foraminal compromise and no obvious compression fracture. Dr. Crutchfield stated that the March 11, 2005 myelogram also demonstrated a disc bulge at C3-4. He advised that appellant's right knee condition was a consequence of the employment injury and that appellant was unable to return to heavy labor, noting that he still had signs of his spinal cord injury based on clinical findings of hyperreflexia, especially in the left lower extremity, tandem walking with an unsteady gait. Dr. Crutchfield noted that appellant had a moderate degree of pain which required intermittent medication and muscle relaxants and advised that he likely could perform desk work. In an attached work capacity evaluation, he advised that appellant could work four hours per day with accommodations including an appropriate chair and that he be driven to work. Dr. Crutchfield provided restrictions to appellant's physical activity of four hours sitting, one hour of walking, standing, reaching, reaching above shoulder, twisting and bending with no operating of a motor vehicle either at work or to or from work. Appellant could repetitively

move his wrists and elbows for eight hours a day and could not push, pull, lift, squat, knee or climb. Breaks of 30 minutes every 3 hours were recommended. By letter dated April 22, 2005, the Office asked Dr. Contreras to review Dr. Crutchfield's report. In a report dated May 17, 2005, Dr. Contreras advised that he agreed with Dr. Crutchfield's findings. Dr. Contreras also advised that appellant told him that he was not going to return to work until his knee and thoracic spine conditions were covered.

On May 19, 2005 the employing establishment offered appellant a position as a general clerk for four hours a day. The position was described as sedentary and within the work tolerance limitations provided by his physician.[1] By letter dated May 23, 2005, the Office the Office advised appellant that the position offered was suitable and gave him 30 days to respond. The Office informed him that, if he failed to report to the offered position or failed to demonstrate that his was not justified, his right to compensation would be terminated. On June 5, 2005 appellant responded that he could not accept the offered position. He stated that Dr. Contreras did not approve the position and that he needed transportation to and from work and an appropriate ergonomic chair. Dr. Contreras appended a note to the job offer stating that once the chair was in place and transportation as outlined by Dr. Crutchfield, appellant could return to work. On June 13 and 30, 2005 the employing establishment informed the Office that an appropriate chair had been ordered and that community bus service was available. Nursing notes advise that bus transportation would pick him up at his home. On July 13, 2005 the chair was received.

By letter dated July 13, 2005, the Office advised appellant that his reasons for refusing the offered position were not acceptable and he was given an additional 15 days to respond. He did not return to work and in a treatment note dated July 26, 2005, Dr. Contreras advised that appellant had fallen and struck his head, following which he developed increased numbness in both upper and lower extremities.

By decision dated July 27, 2005, the Office terminated his wage-loss compensation effective August 7, 2005 on the grounds that he declined an offer of suitable work. On August 21, 2005 he requested a hearing.

On October 6, 2005 the Office issued a preliminary finding that an overpayment in compensation in the amount of $3,168.96 had been created. The Office noted that the overpayment arose because appellant continued to receive compensation through October 1, 2005, after being advised that his compensation had been terminated because he failed to accept suitable employment. The Office found appellant to be at fault because he knew or should have known that he was not entitled to receive further compensation. He was provided with an overpayment questionnaire and informed of the actions he could take in response. By decision dated November 8, 2005, the Office finalized the overpayment decision. The Office reiterated that appellant was at fault and demanded payment in full.

[1] The position description included the following duties: create file folders, clean badges, file, answer telephones, make copies, fax documents and other duties as assigned. Perform general clerk work. He was to be allowed to sit or stand at his convenience and was to be allowed a 30 minutes break or two 15 minutes breaks during the tour.

LEGAL PRECEDENT -- ISSUE 1

Section 8106(c) of the 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." It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[2] The implementing regulation provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee 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 entitlement to compensation is terminated.[3] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[4] 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.[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 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.[7]

ANALYSIS -- ISSUE 1

The record in this case reflects that the physical restrictions of the modified position offered to appellant on May 19, 2005 conformed to those provided by Dr. Crutchfield, a Board-certified neurosurgeon who provided a second opinion evaluation for the Office. In a March 29, 2005 report, Dr. Crutchfield reviewed the medical record, a set of questions and a statement of accepted facts, set forth appellant's history, complaints and his findings on physical examination. He advised that appellant could work four hours of sedentary, limited duty per day with accommodations that he be provided an appropriate chair and be driven to work. Appellant's attending Board-certified neurosurgeon, Dr. Contreras, agreed with Dr. Crutchfield's

[2] *Joyce M. Doll*, 53 ECAB 790 (2002).

[3] 20 C.F.R. § 10.517(a).

[4] *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[5] *Gloria J. Godfrey*, 52 ECAB 486 (2001).

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

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

recommendations on May 17, 2005. The clerk position offered appellant was sedentary and was for four hours a day. Appellant was to be allowed to sit or stand at his convenience and was provided with appropriate breaks. While the inability to travel to work because of residuals of the employment injury can be an acceptable reason for rejecting an offer of suitable work,[8] the employing establishment advised that transportation would pick appellant up at home, and further advised that an appropriate chair had been purchased. All impairments, whether work related or not, must be considered in assessing the suitability of an offered position.[9] The Board finds that, in assessing appellant's capabilities, Dr. Crutchfield properly assessed all impairments. The medical evidence of record thus establishes that, at the time the job offer was made, appellant was capable of performing the modified position.[10]

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 appellant an opportunity to accept or provide reasons for declining the position.[11] The record in this case, however, indicates that the Office did not follow these procedural requirements. By letter dated May 23, 2005, the Office advised appellant that the offered position had been found suitable, and further stated that, if he failed to report to work and failed to demonstrate that the failure was justified, his right to compensation would be terminated. Office procedures regarding offers of employment provide that the Office must advise the claimant that the job is considered suitable, that it remains open, that the claimant will be paid compensation for the difference (if any) between the pay of the offered job and the pay of the date-of-injury job, that the job can be accepted with no penalty, and that he or she has 30 days from the date of the letter to either accept or provide a written explanation with reasons for refusing the offered position.[12] Office procedures further provide that "[a] claimant who unreasonably refuses an offer of suitable employment is not entitled to any further compensation benefits (with the exception of medical expenses for treatment of the accepted condition)."[13]

While the Office informed appellant that his compensation would be terminated in its May 23 and July 13, 2005 suitability letters, the Office did not inform him that, not only would his compensation be terminated, but he would be prohibited from receiving further compensation, *e.g.*, a schedule award. It was not until the July 27, 2005 decision that appellant was fully informed of the penalty provisions of section 8106(c)(2).[14] By not informing appellant

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Offers of Employment*, Chapter 2.814.5(a)(5) (July 1997); *Janice S. Hodges*, 52 ECAB 379 (2001).

[9] *Mary E. Woodward*, 57 ECAB ___ (Docket No. 05-1023, issued November 14, 2005).

[10] *Deborah Hancock*, 49 ECAB 601 (1998).

[11] *See Maggie L. Moore*, *supra* note 4.

[12] Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.814.4(c)(1-5).

[13] *Id.* at Chapter 2.814.4(c)(6).

[14] The Board notes that this decision was issued 14 days after the July 13, 2005 letter, which does not comport with procedural requirements. Office procedures provide that if the claimant's refusal of the offered job is not deemed justified, the Office must so advise the claimant and allow 15 additional days for him or her to accept the job. Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.814.5(d)(1).

of this penalty provision, *i.e.*, that he would not be entitled to any further compensation, the Office did not provide him with proper notice. The Office therefore did not properly terminate appellant's wage-loss compensation on July 27, 2005.[15]

Regarding the overpayment in compensation, as the Office did not meet its burden to terminate appellant's wage-loss compensation on August 7, 2005, he was entitled to receive compensation benefits after that date. Therefore, an overpayment was not created, and the November 8, 2005 decision must be reversed.[16]

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation for refusing suitable work as it did not meet the procedural requirements for notice. An overpayment in compensation was therefore not created.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 8 and July 27, 2005 are hereby reversed.

Issued: July 10, 2006
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

[15] Federal (FECA) Procedure Manual, *supra* note 8.

[16] The Board further notes that Dr. Crutchfield advised that appellant's knee condition was a consequence of his employment injury, and Dr. Contreras advised that appellant's thoracic disc disease was caused by the employment injury. The Office has not developed this aspect of appellant's claim.