United States Department of Labor
Employees' Compensation Appeals Board

PAT M. BURGE, Appellant	)	
	)	**Docket No. 05-1172**
and	)	**Issued: June 5, 2006**
	)	
DEPARTMENT OF THE NAVY, ANDREWS AIR FORCE BASE, MD, Employer	)	

Appearances:
Pat M. Burge, pro se
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 May 3, 2005 appellant filed a timely appeal from a September 2, 2004 merit decision of the Office of Workers' Compensation Programs, terminating his compensation benefits on the grounds that he refused an offer of suitable work. Appellant also appeals the Office's April 13, 2005 merit decision which found that he received an overpayment in the amount of $2,723.27 and that he was at fault in the creation of the overpayment which the Office ordered repayment in the amount of $100.00 per month. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the termination and overpayment decisions.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation benefits effective September 2, 2004 on the grounds that he refused an offer of suitable work; (2) whether the Office properly determined that appellant received an overpayment in the amount of $2,723.27 based on compensation he received after September 2, 2004; and (3) whether the Office properly determined that appellant was at fault in the creation of the overpayment and, therefore, ineligible for waiver of the overpayment.

FACTUAL HISTORY

On March 26, 2003 appellant, then a 56-year-old safety and occupational health specialist, filed a traumatic injury claim alleging that on March 7, 2003 he strained his stomach and passed blood as a result of lifting and carrying two heavy boxes which contained bond paper from the first floor to the second floor. Appellant stopped work on April 1, 2003. By letter dated May 28, 2003, the Office accepted his claim for abdominal strain. The Office paid him appropriate compensation.

The Office received several medical reports from Dr. Jean M. Estime, appellant's attending Board-certified internist, which indicated that he was totally disabled for work due to his work-related injury. By letter dated July 18, 2003, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions, to Dr. Bruce J. Feigelson, a Board-certified surgeon, for a second opinion medical examination.

Dr. Feigelson submitted a July 25, 2003 report in which he found that appellant suffered from a left inguinal hernia. He opined that the diagnosed condition may have worsened but certainly was not caused alone by appellant's work activities. Dr. Feigelson stated that work may have accelerated or precipitated the presentation of the symptomatic hernia but he believed most hernias were congenital in nature. He found that appellant had residuals of his employment-related injury and that he was unable to perform his regular work duties. Dr. Feigelson stated that appellant's condition was temporary in nature and he suspected, with surgery and a four-week convalescent period, appellant should be able to work without limitations. He concluded that appellant continued to demonstrate objective residuals warranting partial disability and that he could not perform his regular work duties without limitation due to his current physical examination and mental fixation on the site of discomfort.

In a work capacity evaluation (Form OWCP-5) dated August 1, 2003, Dr. Feigelson indicated that appellant could work six hours a day with certain physical restrictions which included lifting no more than 20 pounds and no prolonged standing. He stated that appellant also suffered from depression and anxiety which allowed him to fixate on his pain that may be related to his hernia. Dr. Feigelson stated that appellant would reach maximum medical improvement four weeks after inguinal hernia repair.

By letter dated September 22, 2003, the Office advised the employing establishment that Dr. Feigelson's report constituted the weight of the medical opinion evidence. The Office requested that the employing establishment offer appellant a light-duty job based on Dr. Feigelson's restrictions.

On October 17, 2003 the employing establishment offered appellant a modified safety and occupational health specialist position in Washington, DC. It stated that this position was the best position that could be offered at that time and it was within the restrictions set forth by appellant's attending physician. The position required general office filing at least 10 percent of the time with no reaching or working above shoulder level. The position also involved administrative support duties such as, preparing inspection reports, memoranda and letters, keyboarding and maintenance of inventories. The physical requirements included short distance

walks to pick up correspondence and mail on an intermittent basis and no lifting beyond 20 pounds. The position allowed appellant to sit or stand at his convenience.

On October 31, 2003 appellant rejected the employing establishment's job offer. He stated that due to his medical/physical condition and medication he could not perform the duties of the offered position. Appellant related that his attending physician had put him on bed rest and advised him to avoid exertion. He indicated that his work-related injury affected his financial situation which caused him to move back to Georgia to obtain help from his family. He requested assistance in finding a position in Georgia and stated that when or if he fully recovered from the accepted employment injury he would be available to perform the duties of the offered position. Appellant concluded that he was in no way ready physically, medically and mentally to return to work at that time.

Appellant submitted Dr. Estime's October 31, 2003 report which indicated that he was still under her care and that he was unable to work from November 2, 2003 through January 5, 2004 due to his work-related severe abdominal strain which correlated to a left inguinal hernia. Dr. Estime stated that appellant was experiencing severe pain and was being treated with medication. She recommended that he avoid exertion of any kind until he was evaluated by Dr. James Libby, an urologist.

In a November 30, 2003 letter, the Office advised appellant that a suitable position was available and that, pursuant to 5 U.S.C. § 8106(c)(2), he had 30 days to either accept the job or provide an explanation for refusing the offer. The Office further advised him that his compensation would be terminated based on his refusal to accept a suitable position pursuant to section 8106(c)(2).

Appellant submitted duplicate copies of his October 31, 2003 rejection and Dr. Estime's report of the same date.

By letter dated December 31, 2003, the Office found appellant's reasons for rejecting the position unacceptable. The Office advised him that he had 15 days in which to accept the offered position, or it would terminate his compensation.

In a January 6, 2004 letter, the Office advised Dr. Feigelson that his July 25, 2003 report did not clarify appellant's work restrictions. The Office requested that he complete an enclosed Form OWCP-5 and indicate whether appellant was capable of employment. The Office also enclosed a copy of the employing establishment's job offer and requested Dr. Feigelson to determine whether appellant could perform the duties of this position. The Office further requested that he provide whether appellant had reached maximum medical improvement and, if so, determine whether he had any permanent impairment based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001).

By letter dated January 6, 2004, appellant requested that the Office reconsider its decision. Appellant contended that Dr. Feigelson had confused him with another patient with regard to his ability to work. He noted Dr. Libby's finding that there was no subjective or objective evidence of an inguinal hernia but that he could not concentrate or work due to his medication. Appellant indicated that Dr. Libby's report was forthcoming. He also indicated that

Dr. Feigelson found that he suffered from depression, anxiety and pain causally related to his employment-related injury. Appellant requested that the Office refer him to a gastroenterologist or a surgeon for the adhesions/scar tissue resulting from his work-related injury. He stated that he was not rejecting the employing establishment's job offer but indicated that he was unable to accept the offered position due to his medical/physical and mental conditions. Appellant noted that his move to Georgia was due to his financial situation. He stated that he had been advised by the Office that if he could not return to the Maryland/Washington, DC area, then he would remain on the rolls until at least a suitable job was found within his commuting area, Atlanta, Georgia.

Dr. Feigelson did not respond to the Office's January 6, 2004 letter. By letter dated May 10, 2004, it referred appellant, together with a statement of accepted facts, the case record and list of questions, to Dr. Deborah A. Martin, a Board-certified surgeon, for a second opinion medical examination.[1]

In a June 18, 2004 report, Dr. Martin provided a history of appellant's March 7, 2003 employment injury and medical history. She reported essentially normal findings on physical examination and diagnosed a ventral/incisional hernia at the ostomy site. In response to the Office's questions, Dr. Martin stated that a ventral/incisional hernia was suspected due to pain in the area on examination with reported muscle spasms starting in this area as evidence that appellant continued to suffer from his accepted employment-related injury. With regard to the Office's question as to whether appellant's preexisting diverticulitis and prior abdominal surgery were aggravated temporarily or permanently by the March 7, 2003 employment injury, Dr. Martin stated that the accepted employment injury may have aggravated appellant's preexisting weakness in the scar tissue, resulting in a hernia. She reviewed a description of the offered modified position and opined that appellant should be able to perform the duties of this position with the stated limitations. Dr. Martin did not complete a Form OWCP-5 listing appellant's physical limitations because she found that his current limitations were reasonable considering his condition.

After reviewing Dr. Martin's report, the Office determined that further clarification was necessary. On July 13, 2004 the Office requested that she provide objective findings to support an abdominal strain as a result of the March 7, 2003 employment injury and an aggravation of appellant's preexisting diverculitis or abdominal hernia. The Office further requested that Dr. Martin provide objective findings of scar tissue weakness. If the conditions were temporary, the Office asked her to provide the date they ceased. In addition, the Office requested that she complete a Form OWCP-5. Dr. Martin did not respond.

On July 13, 2004 the employing establishment advised the Office that the position offered to appellant on October 17, 2003 was still available. A description of the position provided additional restrictions which included keyboarding for one hour a day, no overtime or compensatory time and travel/training outside of the Naval District Washington, DC region, a straight six-hour, five-day-a-week schedule, no bending, stooping, pulling and pushing, and

[1] In an April 16, 2004 memorandum to the file, the Office stated that Dr. Feigelson's evaluation would not be considered part of the record because he did not respond to its request for clarification regarding appellant's work restrictions and ability to perform the duties of the offered position.

intermittent filing. The employing establishment stated that it was the best position available at that time and it was within the physical restrictions set forth by appellant's attending physician.

By letter of the same date, the Office advised appellant that the modified position of safety and occupational health specialist offered to him was suitable and that, pursuant to section 8106(c)(2) of the Federal Employees' Compensation Act, he had 30 days to either accept the job or provide an explanation for refusing the job offer. The Office further advised that it would be terminating his compensation based on his refusal to accept a suitable position pursuant to section 8106(c)(2).

On July 24, 2004 appellant rejected the job offer. He stated that he had been declared totally and permanently disabled. Appellant further stated that he had applied for disability retirement and was awaiting a decision.

In an August 16, 2004 letter, the Office advised appellant that his reasons for refusing the job offer were unacceptable. The Office further advised that he had 15 days in which to accept the offered position, or his compensation would be terminated. In an August 27, 2004 response letter, appellant reiterated that he was unable to accept the offered position due to his medical condition and that he was seeking disability retirement.

By decision dated September 2, 2004, the Office terminated appellant's compensation benefits effective that date on the grounds that he refused an offer of suitable work. The Office found that Dr. Martin's June 18, 2004 report constituted the weight of the medical opinion evidence as it was comprehensive and well rationalized.

On January 24, 2005 the Office issued a preliminary determination that an overpayment in the amount of $2,723.27 had occurred because the Office terminated appellant's compensation benefits on September 2, 2004, yet he continued to receive compensation through October 2, 2004. The Office found that appellant was not without fault in the creation of the overpayment, as he was informed, by the September 2, 2004 decision, that he was no longer entitled to compensation benefits.

On February 2, 2005 appellant requested waiver due to financial hardship. He submitted a completed overpayment questionnaire and supporting financial documents.

In a decision dated April 13, 2005, the Office finalized the preliminary overpayment determination. The Office found that appellant was not without fault in the creation of the overpayment in the amount of $2,723.27 that occurred from September 2 to October 2, 2004 because he received compensation which he knew or should have known he was not entitled to receive. The Office ordered him to repay the overpayment in the amount of $100.00 per month.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits. Under section 8106(c)(2) of the Act,[2] the Office may

[2] 5 U.S.C. §§ 8101-8193.

terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[3] Section 10.517 of the Office's 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, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[5] This burden of proof is applicable if the Office terminates compensation under section 8106(c) for refusal to accept suitable work.

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained an abdominal strain following his March 7, 2003 employment injury. He received compensation for total disability. The Office subsequently terminated appellant's compensation, finding that he refused an offer of suitable work based on the June 18, 2004 medical report of Dr. Martin, an Office referral physician. The Board finds that the Office improperly terminated appellant's compensation.

Dr. Martin found that appellant continued to experience residuals of the March 7, 2003 employment injury as evidenced by her finding that he had a ventral/incisional hernia at the ostomy site due to pain in the area with reported muscle spasms starting in this area. She further found that his preexisting diverculitis and abdominal hernia may have been aggravated by the accepted employment injury which resulted in a hernia. Dr. Martin reviewed a description of the modified safety and occupational health specialist position offered to appellant by the employing establishment. She opined that he was capable of performing the duties of this position with the stated limitations. Dr. Martin stated that appellant's current limitations were reasonable considering his condition. It is unclear, however, whether she was adopting the medical restrictions previously specified by Dr. Feigelson.

The Office requested that Dr. Martin clarify her opinion regarding the causal relationship between the diagnosed conditions and the March 7, 2003 employment injury. The Office also requested that she complete a Form OWCP-5 providing appellant's physical limitations. Dr. Martin did not respond. The Board finds that the medical evidence is not sufficiently developed as to whether the offered position is medically suitable. Neither Dr. Feigelson nor Dr. Martin were fully responsive to the Office. Once the Office refers a claimant to a physician, it has the responsibility to obtain an evaluation which will resolve the issue involved in the case.[6] The Office failed to fully develop the medical evidence with regard to appellant's physical limitations in determining the suitability of the offered position. It did not meet its burden of proof in terminating appellant's compensation benefits.

---

[3] *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987).

[4] 20 C.F.R. § 10.517; *see also Catherine G. Hammond*, 41 ECAB 375 (1990).

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

[6] *See Mae Z. Hackett*, 34 ECAB 1421 (1983).

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation benefits effective September 2, 2004 on the grounds that he refused an offer of suitable work because it failed to properly develop the medical evidence in this case.[7]

ORDER

IT IS HEREBY ORDERED THAT the April 13, 2005 decision of the Office of Workers' Compensation Programs is set aside. The Office's September 2, 2004 decision is reversed.

Issued: June 5, 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

[7] In light of the Board's disposition of the first issue, the overpayment issues are rendered moot.