United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 06-253**
	)	**Issued: November 24, 2006**
DEPARTMENT OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION, Mount Gay, WV, Employer	)	

Appearances
Capp P. Taylor, Esq., for the appellant
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 14, 2005 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated September 28, 2005. Under 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 benefits on the grounds that he refused an offer of suitable work.

FACTUAL HISTORY

Appellant, a 44-year-old mine inspector, injured his right knee on February 2, 1995 when he slipped and struck his knee on a shuttle car he was inspecting. He filed a claim for benefits on February 3, 1995 which the Office accepted for medial meniscus tear of the right knee. On

December 4, 1995 appellant injured his lower back while changing his shoes. He filed a claim for benefits on February 3, 1995 which the Office accepted for low back strain. The Office paid appropriate compensation for total disability.

In a report dated September 16, 2003, Dr. Luis A. Loimil, appellant's treating physician and a Board-certified orthopedic surgeon, stated that appellant had post-traumatic arthrosis of the right knee with torn medial meniscus. He advised that, at the time of his last examination on August 22, 2003, appellant had good range of motion of the knee with marked crepitus on motion. Dr. Loimil stated that appellant experienced locking episodes at times and had to alternate periods of sitting and standing due to the fact that he falls at times due to his knee condition. He recommended that appellant undergo a functional capacity evaluation in order to determine his physical demand level.

Appellant underwent a November 18, 2003 functional capacity evaluation which indicated that he was able to work at a light physical demand level for eight hours per day. The tests indicated that he had leg lifting capability of 10 pounds and torso lifting of 30 pounds. Appellant rated a 26 out of 30 on the validity criteria or 87 percent, which suggested good effort and valid results in regard to medical and vocational planning. Based on the test results, he was found capable of shoulder lifting, overhead lifting and carrying up to 30 pounds and judged capable of pushing 15 pounds and pulling 10 pounds. Appellant was given restrictions of occasional sitting, standing, walking, bending and reaching, with no squatting, kneeling, crawling and climbing. Appellant was also permitted to perform simple grasping with both hands.

On December 22, 2003 Dr. Loimil indicated that he approved the results of the functional capacity evaluation and checked a form indicating that he believed appellant was capable of performing light work.

On December 29, 2003 appellant filed a claim for a consequential injury to his coccyx. He claimed that on December 26, 2003 the weakness in his knee caused him to fall on his right hip while exiting his house.[1]

In a report dated January 21, 2004, Dr. Loimil related that appellant had complaints of lumbar spine and right hip pain. He stated:

> "[Appellant] states that on December 26, 2003 his right knee gave way and he fell down some steps at home. He states [that] he landed on his buttocks and slid down the steps. [Appellant] went to the emergency room at Logan General Hospital on that date. He returned to the emergency room on December 30, 2003 at which time he was x-rayed, including the pelvis and he was released. [Appellant] is complaining of pain in the coccyx that radiates to the right side of the buttock. He has constant pain with sitting and with standing for any length of time."

[1] There is no claim form in the record pertaining to this claim. Appellant's wife apparently telephoned in the claim on December 26, 2003.

Dr. Loimil noted some tenderness on palpation of the coccyx on examination. He stated that x-rays of the coccyx were within normal limits and diagnosed contusion of the coccyx. On March 2, 2004 Dr. Loimil signed a form indicating that appellant's coccyx injury did not necessitate any changes in his release to light work. The Office accepted the claim on March 24, 2004 for contusion of the coccyx.[2]

On March 9, 2004 Casey Vas, the vocational counselor assigned to appellant's claim, wrote to the employer and inquired whether any jobs were available to him at the light exertional level. The record does not indicate that the employer responded to this request for information regarding the availability of positions.

On February 27, 2004 appellant's wife telephoned the Office and informed them that he had injured his right knee while exiting from his van. She stated that she was filing a consequential claim based on this injury.

On March 24 and 26, 2004 the employing establishment offered appellant a job as a mine safety and health specialist based on the work restrictions outlined in the November 18, 2003 functional capacity evaluation and approved on December 23, 2003 by Dr. Loimil.[3] The employing establishment advised appellant that the job was located in Dallas, Texas, outside of his current commuting area. However, the employing establishment informed him that, under 20 C.F.R. § 10.123(f), he was entitled to compensation for relocation expenses.

An Office telephone call memorandum of record states that on March 26, 2004 appellant's wife, acting as his representative, telephoned the Office and questioned whether a job was available in appellant's commuting area in West Virginia, rather than Dallas Texas. The memorandum indicates that appellant's representative was advised that "agency has the right to make job offer where they deem necessary as long as the offer is within the claimant's medical restrictions."

By letter dated March 29, 2004, the Office advised appellant that a suitable position was available and that, pursuant to section 8106(c)(2), he had 30 days to either accept the job or provide a reasonable, acceptable explanation for refusing the offer. It advised him that it would be terminating his compensation based on his refusal to accept a suitable position which reflected his ability to work as a mine safety and health specialist for eight hours per day. The Office stated that, if appellant refused the job or failed to report to work within 30 days without reasonable cause, it would terminate his compensation pursuant to 5 U.S.C. § 8106(c)(2).[4]

[2] Appellant's wife apparently made an additional call in support of this claim by telephone on February 9, 2004.

[3] The employing establishment stated that the job was primarily sedentary in nature, allowing appellant the freedom to stand, sit and walk as he deemed necessary. The position entailed occasional bending, reaching and lifting not exceeding 10 pounds; it required no squatting, kneeling, crawling or climbing and met all of the restrictions set forth in the November 18, 2003 functional capacity evaluation report.

[4] 5 U.S.C. § 8106(c)(2).

In a report dated April 2, 2004, Dr. Loimil stated:

> "[Appellant] returns today for evaluation of his knee. He states that on February 27, 2004 he twisted the right knee getting out of his van. [Appellant] went to Logan General Hospital emergency room where x-rays were taken. The films were reviewed and they show no changes from the previous films. He is complaining of severe medial pain. On examination there is no swelling, but he says he has a catching in the knee. We need to request authorization for a magnetic resonance imaging [MRI] scan of the right knee to rule out underlying pathology. I explained to him that eventually he will need to be referred to a physician who does federal examinations to see exactly what the status is in his return work capability as he would need to evaluate all of his conditions. Once he receives authorization for the MRI [scan] he will give us a call and we will get it scheduled."

By letter dated April 20, 2004, appellant's wife rejected the job offer on the grounds that his reinjury of his right knee on February 27, 2004 prevented him from accepting the position. She also stated that she did not believe her family could financially afford relocating to Dallas, Texas. By letter dated April 23, 2004, appellant's wife stated that he had been examined by Dr. Loimil on April 2, 2004 at which time Dr. Loimil indicated that he needed appellant to undergo an MRI scan in order to determine whether he was capable of performing the job offered by the employing establishment. Appellant also indicated on the job offer that he was requesting an extension of time to consider the offer because of medical reasons.

By letter dated April 26, 2004, appellant's wife indicated that he underwent an MRI scan on April 25, 2004, attached to the letter, indicating that he had sustained another meniscus tear and had fluid on his right knee.[5] She, therefore, asserted that appellant was unable to accept the modified job offer because appellant was medically and physically unable to perform the position; the job offer failed to take into account the current condition of his right knee. Appellant's wife further asserted that, contrary to the Office's letter, the job offer in Texas was not the closest in proximity to his current place of work. She alleged that she and appellant had learned that there were in fact job vacancies available in their current home state of West Virginia. Appellant's wife further asserted that moving to Texas to accept employment there was not financially reasonable, as the Office stated, because the price of home rentals in Texas was two or three times the price of comparable home rentals in West Virginia.

[5] The MRI scan report stated:

> "The anterior and posterior cruciate ligaments are intact. A small amount of fluid is present within the joint. There is abnormal signal involving the superior surface of the medial meniscus, best seen involving the posterior horn. Differential considerations would include post meniscectomy changes of a tear. There is chondromalacia involving the weightbearing surface of the posterior aspect of the medial femoral condyle or findings in association with an old osteochondral defect. In addition, I do suspect chondromalacia patella involving the lateral patellar facet.
>
> IMPRESSION:
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> Abnormal signal involving the medial meniscus, indicating a tear or post meniscectomy changes."

By letter dated April 30, 2004, the Office advised appellant that he had 15 days in which to accept the position or it would terminate his compensation. He did not respond within 15 days.

By letter dated May 11, 2004, the Office asked Dr. Loimil to submit an opinion as to whether appellant sustained a consequential injury to his right knee on February 27, 2004. The also requested that he provide a diagnosis of injury if he did in fact believe an injury had occurred on that date and to indicate whether this injury prevented appellant from returning to light work or caused a change in his previous work restrictions. Dr. Loimil submitted treatment notes from April 2003 through May 14, 2004. He stated on May 14, 2004 that x-ray films taken on April 30, 2004 of the right knee showed narrowing medially but that appellant was not a candidate for reconstructive knee surgery at that time.[6] Dr. Loimil related appellant's complaints of increased pain since the February 27, 2004 incident and requested authorization for an arthroscopy because he had not responded to conservative treatment. He did not, however, submit any probative, rationalized medical opinion indicating that appellant had sustained a consequential injury. By decision dated July 12, 2004, the Office denied appellant's claim for a consequential right knee injury, finding that he did not submit medical evidence sufficient to establish that he sustained a consequential knee injury.

By decision dated July 12, 2004, the Office terminated appellant's compensation benefits on the grounds that he refused an offer of suitable work.

By letter dated July 5, 2005, appellant's attorney requested reconsideration. Counsel indicated that the Office erred in terminating appellant's compensation because it failed to consider all of his medical conditions in finding that the job was suitable.

By decision dated September 28, 2005, the Office denied appellant's request for modification of the July 12, 2005 decision terminating his compensation.

LEGAL PRECEDENT

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 Federal Employees' Compensation Act[7] the Office may 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.[8] 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.[9]

[6] Appellant underwent MRI scans on April 25 and 30, 2005.

[7] 5 U.S.C. § 8101 *et seq.*

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

[9] 20 C.F.R. § 10.517; *see also Catherine G. Hammond*, 41 ECAB 375 (1990).

Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work; setting for the specific restrictions, if any, on the employee's ability to work, and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.[10] However, all of appellant's medical conditions, whether work related or not, must be considered in assessing the suitability of the position.[11]

If possible, the employer should offer suitable reemployment 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.[12]

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.[13] This burden of proof is applicable if the Office terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work.

ANALYSIS

The determination 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 the medical evidence.[14] In the instant case, Dr. Loimil approved work restrictions on December 29, 2003 in accordance with appellant's November 18, 2003 functional capacity evaluation, based on his accepted right knee condition which indicated that he was able to work a sedentary job at a light physical demand level for eight hours per day. Appellant was restricted from leg lifting not exceeding 10 pounds; torso lifting not exceeding 30 pounds; shoulder lifting, overhead lifting, not exceeding 30 pounds, pushing not exceeding 15 pounds and pulling not exceeding 10 pounds. In addition, he was given restrictions of occasional sitting, standing, walking, bending and reaching, with no squatting, kneeling, crawling and climbing. After appellant sustained a coccyx injury on December 26, 2003 which the Office subsequently accepted as a consequential injury, Dr. Loimil signed a form on March 2, 2004 which indicated that his coccyx injury did not necessitate any changes in his release to light work. On March 24 and 26, 2004 the employing establishment offered appellant a job as a mine safety and health specialist based on the work restrictions Dr. Loimil approved on December 23, 2003.

On March 29, 2004 the Office found that the position of mine safety and health specialist offered by the employing establishment was within Dr. Loimil's restrictions. However, after appellant sustained another fall at his home on February 27, 2004 for which he filed another

[10] *Linda Hilton*, 52 ECAB 476, 481 (2001).

[11] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (December 1993).

[12] 20 C.F.R. § 10.508 (1999).

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

[14] *Robert Dickinson*, 46 ECAB 1002 (1995).

claim for consequential injury based on his right knee, Dr. Loimil stated in an April 2, 2004 report, that appellant complained of severe medial pain in the knee in addition to a "catching" condition which required additional diagnostic testing through MRI scan. An April 25, 2004 MRI scan of the right knee indicated that appellant had meniscus tear and fluid in the right knee, with "an abnormal signal involving the medial meniscus, indicating a tear or post meniscectomy changes." Dr. Loimil stated on May 14, 2004 that the results from the April 30, 2005 x-ray films showed medial narrowing of the right knee. He opined that appellant's complaints of increased pain since the February 27, 2004 incident, taken together with the fact that he had not responded to conservative treatment, necessitated that appellant undergo an arthroscopy.

Once appellant submitted this additional medical evidence indicating that he had greater acute physical findings than those upon which the mine safety and health specialist was based, the offered position may no longer have been suitable. The Office is required to include those conditions, regardless of etiology, which existed prior to the job offer.[15] The Office, however, failed to consider the effects of a nonwork-related medical condition in determining whether the position it offered to appellant was suitable.[16]

In addition, the Board finds that the Office committed reversible error by not developing the issue of whether work was available near appellant's home in West Virginia. As the Board has previously explained: "The regulation now states that the employer 'should' offer suitable reemployment where the employee currently resides, if possible…. It was reversible error for the Office to terminate appellant's compensation benefits without positive evidence showing such an offer was not possible or practical."[17] The evidence of record indicates that the offer of employment in Dallas, Texas would have required relocation from appellant's home in West Virginia, but that the Office did not develop the facts to ascertain whether suitable reemployment as a mine safety and health specialist was available near appellant's home in West Virginia, before requiring the relocation to Texas. The Office's telephone memorandum indicates that the Office merely rubber stamped the employer's choice of location without question.

As it is the Office's burden of proof to establish that appellant refused a suitable position, the Office did not meet its burden of proof in this case to terminate appellant's compensation benefits pursuant to 5 U.S.C. § 8106.[18] Accordingly, the Board reverses the Office's September 28, 2005 decision affirming the July 12, 2004 decision terminating appellant's compensation on the grounds that he refused an offer of suitable work.

[15] *See* 20 C.F.R. § 10.124(c).

[16] Appellant did not challenge the Office's July 12, 2004 decision finding that his February 27, 2004 falling incident which occurred at his home did not constitute a consequential injury causally related to his February 2, 1995 work injury.

[17] *Sharon L. Dean*, 56 ECAB ___ (Docket No. 04-1707, issued December 9, 2004).

[18] *Barbara R. Bryant*, 47 ECAB 715 (1996).

CONCLUSION

The Board finds that the Office did not meet its burden to terminate appellant's compensation benefits pursuant to 5 U.S.C. § 8106.

ORDER

IT IS HEREBY ORDERED THAT the September 28, 2005 decision of the Office of Workers' Compensation Programs be reversed.

Issued: November 24, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board