

**United States Department of Labor
Employees' Compensation Appeals Board**

H.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Brooklyn, NY, Employer**

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**Docket No. 06-474
Issued: October 26, 2006**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 22, 2005 appellant filed a timely appeal of a September 19, 2005 merit decision of the Office of Workers' Compensation Programs denying his claim for continuing compensation benefits and a November 29, 2005 nonmerit decision denying reconsideration without further merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUES

The issues are: (1) whether appellant has established entitlement to continuing compensation benefits on or after September 2, 1997; and (2) whether the Office properly denied his request for reconsideration pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has previously been before the Board. A summary of the facts leading up to the first appeal is as follows. The Office accepted that appellant sustained a lumbosacral sprain and deep vein thrombosis of the left leg as a result of his December 1, 1975 injury incurred when

lifting a mail sack. The Office also accepted that he sustained a herniated disc from lifting heavy objects at work. The Office paid appropriate compensation for disability and medical benefits. On June 10, 1996 the employing establishment offered appellant a limited-duty position as a lobby monitor with the ability to walk at his comfort and limitations of no lifting over 10 pounds and no repetitive bending, twisting or squatting. The duties were sitting or standing in an employing establishment's lobby assisting customers with questions on mail services, retrieving accountable mail for customers to expedite lobby lines and directing customers to the appropriate window service areas. On June 14, 1996 appellant declined the job offer. He submitted a report dated June 13, 1996 from his attending physician, Dr. Cesar N. Abiera, Jr., a Board-certified family practitioner, stating that appellant was "unable to work because of his medical condition."

By letter dated May 15, 1997, the Office advised appellant that it had determined that the position of lobby monitor was suitable based on a report by Dr. Michael J. Smigielski, a Board-certified orthopedic surgeon and second opinion examiner. He concluded that appellant was able to perform the position. The Office advised appellant that he had 30 days to accept the position or provide an explanation for refusing it and also advised appellant that any claimant who refuses an offer of suitable employment is not entitled to compensation for wage loss. By letter dated June 2, 1997, appellant contended that he could not perform the offered position. After ascertaining that the offered position was still available, the Office, by letter dated July 16, 1997, notified appellant that his reasons for refusing the offer were unacceptable. He was given 15 days to accept the offer or have his compensation terminated. By letter dated July 28, 1997, he asked why he could not be offered a position in Florida, where he had lived since 1990, rather than the one offered in Brooklyn, New York, where he resided at the time of the employment injury. Appellant submitted an August 26, 1997 report from Dr. Abierra who indicated that he had treated appellant for chronic back pain and post phlebotic syndrome. He recommended that appellant remain in a warm place all year since his chronic back pain was exacerbated by cold weather.

By decision dated September 2, 1997, the Office terminated appellant's compensation on the basis that he refused an offer of suitable employment. The Office found that the weight of the medical evidence established that appellant could perform the offered position and the fact that warmer weather was recommended was not a sufficient basis for refusing the offered position.

Appellant requested a hearing before an Office hearing representative, which was held on June 5, 1998. In further support of his claim, appellant submitted a September 9, 1997 medical report by Dr. Harvey R. Grable, a Board-certified orthopedic surgeon, who treated him from August 23, 1984 to March 28, 1990 and concluded, on the basis of his examination of appellant on September 9, 1997 that appellant could not work in any capacity for the employing establishment. Dr. Grable explained that appellant had continuous low back pain radiating to this right lower extremity as well as periodic swelling of both legs. He concluded, "It continues to be my impression that [he] has lumbar radiculitis from a 'hard disc' ... as well as bilateral chronic knee synovitis and vascular insufficiency from his thrombophlebitis." Dr. Grable concluded that appellant cannot work in any capacity for the employing establishment, whether light-duty or part-time duty. He noted that appellant could not stand more than 20 minutes, walk more than 2 blocks or lift more than 5 pounds. Dr. Grable opined that appellant was "permanently and significantly disabled."

By decision dated September 28, 1998, an Office hearing representative found that the Office properly terminated appellant's compensation for rejecting suitable work. The Office denied his request for reconsideration in a decision dated January 26, 1999. Appellant filed an appeal to the Board. By decision dated March 22, 2001, the Board affirmed the Office's termination of his compensation for refusing suitable work.¹ However, the Board found that the report of Dr. Grable created a conflict in opinion with Dr. Smigielski as to whether appellant could perform modified work. The Board noted that as this report was not in evidence at the time of termination of benefits, the Office properly terminated benefits on September 2, 1997. The Board remanded the case for further development of the medical evidence.

On August 23, 2001 the Office referred appellant, together with a statement of accepted facts, the medical record, a copy of the position description and a set of questions, to Dr. Emmanuel Scarlatos, a physician Board-certified in orthopedic surgery. After examining appellant and reviewing the medical evidence, Dr. Scarlatos determined that he was capable of performing the duties of modified lobby monitor "despite a persistent problem with his lower extremities as far as aching and edema are concerned." He suggested that accommodations be made for appellant, including, *inter alia*, that he be allowed to alter positions frequently between standing, sitting and walking; that appellant have a special chair and/or desk; and that consideration be given to an exercise program. Dr. Scarlatos further stated:

"In summary, I would indicate that [appellant] is not totally disabled. I think he has a moderately significant impairment with a vascular component of his lower extremities and secondly to his low back degenerative pathology. These conditions, however, on examination would not suggest that he is incapable of some form of light duties and the most recent [magnetic resonance imaging (MRI) scan] requested by Dr. Broderick of [January 31, 2000] would support this position. Accordingly, I have consented by endorsement to the work capacity evaluation as well as the limited-duty job offer submitted for review."

Appellant submitted medical reports and requested reconsideration on May 10, 2004. By decision dated May 24, 2004, the Office denied his reconsideration request. Another request for reconsideration was denied by decision dated October 27, 2004.

On appeal, in an order dated May 22, 2005, the Board found that appellant's case was not in posture for decision as the Office erred in not issuing a formal decision after reviewing the impartial medical opinion. The case was remanded for issuance of a formal decision and any further development of the evidence that the Office deemed necessary.²

On December 17, 2004 appellant submitted a medical report by Dr. Edward Rossario, a Board-certified orthopedic surgeon. He indicated that appellant first saw him on October 20, 1998 upon the referral of Dr. Abierra. Appellant did not have the ability to perform gainful employment for the employing establishment due to a psychiatric condition. In a December 9, 2004 report, Dr. R.J. Zwolinski, a Board-certified neurologist, stated that appellant suffered from

¹ Docket No. 99-1295 (issued March 22, 2001).

² Docket No. 99-1295 (issued March 22, 2001).

“chronic lumbar radiculopathy with pain and has been under my care since 1995....” Dr. Zwolinski noted that there was documented degenerative disc disease of the LS spine and symmetrical bulging which produced bilateral lateral recess and foraminal narrowing. He noted that appellant had not engaged in any gainful employment since 1997.

By decision dated September 19, 2005, the Office found that the weight of the medical evidence was represented by the report of the impartial medical examiner, Dr. Scarlatos. Appellant’s compensation benefits remained terminated on the grounds that he refused an offer of suitable work.

On October 13, 2005 appellant requested reconsideration, contending that, due to his psychological condition, he could not perform the duties of the offered position. He submitted a September 29, 2005 medical report from Dr. Zwolinski who stated that appellant did not think that he had the ability to work as a lobby monitor due to his physical and emotional conditions. In an October 3, 2005 report, Dr. Abiera stated:

“It is my medical opinion that because of his emotional status and physical status which includes back problems which can be aggravated by prolonged sitting and [appellant’s] severe lower extremity varicosities associated with phlebitis and deep vein thrombosis, he was unable to work in any capacity since his injuries.”

Appellant also submitted the report of a November 4, 2005 examination by Dr. Abiera and the results of an April 29, 2005 MRI scan.

By decision dated November 29, 2005, the Office denied appellant’s request for reconsideration without reviewing the merits of the case. The Office found that the evidence submitted by appellant was cumulative and repetitive of information already submitted.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.³ In this case, the Office had terminated appellant’s compensation under section 8106(c)(2) of the Federal Employees Compensation Act, which 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.⁴ The Board previously affirmed the Office’s determination that the employing establishment successfully terminated appellant’s compensation as of September 2, 1997.

As the Office met its burden of proof to terminate appellant’s compensation based on his refusal of suitable work, the burden shifted to appellant to show that his refusal to work in that position was justified.⁵

³ *Linda D. Guerrero*, 54 ECAB 556 (2003).

⁴ 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

⁵ *See Ronald M. Jones*, 52 ECAB 190 (2000).

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.⁶ Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.⁷

ANALYSIS -- ISSUE 1

Where the Office shows that the offered limited-duty position was suitable based on a claimant's work restrictions at that time, the burden then shifts to the claimant to show that his or her refusal to work in that position was justified. Appellant has not met his burden of proof.

Dr. Smigielski, a second opinion physician, concluded that the position offered to appellant was suitable. Based on this opinion, the Office terminated benefits effective September 2, 1997. Subsequent to the termination of benefits, appellant submitted a report by Dr. Grable, a treating Board-certified orthopedic surgeon, who he indicated that appellant could not work in any capacity. The Board found a conflict in medical opinion between Dr. Grable and Dr. Smigielski as to whether appellant could return to work and remanded the case for the Office to determine whether he was entitled to continuing benefits after September 2, 1997.⁸ Pursuant to the Board's instructions, the Office referred the case to an impartial medical examiner, Dr. Scarlatos, to resolve the conflict. He conducted a physical examination and reviewed appellant's medical history and the requirements of the proposed suitable position. Dr. Scarlatos determined that he was capable of performing the duties of modified lobby monitor "despite a persistent problem with his lower extremities as far as aching and edema are concerned." He endorsed the limited-duty job offer.

Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.⁹ Although Dr. Scarlatos indicated that appellant continued to have "a persistent problem with his lower extremities as far as aching and edema are concerned," he found that appellant was not totally disabled. He determined that, although appellant had "a moderately significant impairment with a vascular component of his lower extremities and secondly to his low back degenerative pathology," these conditions did disable appellant from performing light duties as were set forth in the submitted position description. The Board finds that the opinion of Dr. Scarlatos is well rationalized and based on a proper factual and medical background. It is entitled to special weight. Accordingly, the Office

⁶ 5 U.S.C. § 8123(a); see also *Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

⁷ *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

⁸ Docket No. 99-1295 (issued March 22, 2001).

⁹ *Richael O'Brien*, 53 ECAB 234, 241-42 (2001).

properly found that appellant was not entitled to continuing compensation after September 2, 1997.

LEGAL PRECEDENT -- ISSUE 2

The Act¹⁰ provides that the Office may review an award for or against compensation upon application by an employee who receives an adverse decision. The employee may obtain this relief through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.¹¹

To require the Office to reopen a case for merit review under 5 U.S.C. § 8128(a), the Office's regulations provide that the application for reconsideration must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.¹²

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and is reviewed on the merits.¹³

ANALYSIS -- ISSUE 2

Appellant did not submit any new relevant legal argument, nor did he allege that the Office erroneously applied or interpreted a specific point of law. Consequently, he is not entitled to a review of the merits of his claim based on the first and second requirements of section 10.606(b)(2).

With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, the Board finds that this evidence is repetitious of statements previously considered. Material which is cumulative or duplicative of that already in the record had no evidentiary value in establishing a claim and does not constitute a basis for reopening a case for further merit review.¹⁴ The record already contains numerous reports by Dr. Abiera stating that appellant was unable to work. Furthermore, the record contains a previous report by Dr. Zwolinski indicating that appellant could not maintain gainful employment. The additional reports of these physicians are duplicative of their opinions

¹⁰ 5 U.S.C. § 8101 *et seq.*

¹¹ 20 C.F.R. § 10.605.

¹² 20 C.F.R. § 10.606.

¹³ 5 U.S.C. §§ 8101-8193, § 8128(a). The Board has found that the imposition of the one-year limitation does not constitute an abuse of discretionary authority granted the Office under section 8128(a) of the Act. *See Adell Allen (Melvin L. Allen)*, 55 ECAB ____ (Docket No. 04-208, issued March 18, 2004).

¹⁴ *Daniel M. Dupor*, 51 ECAB 482 (2000).

previously submitted and considered by the Office. Appellant has failed to submit evidence sufficient to warrant a merit review of the claim.¹⁵

CONCLUSION

The Board finds that appellant has not established entitlement to continuing compensation after September 2, 1997. The Board further finds that the Office properly denied his request for reconsideration, pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 29 and September 19, 2005 are affirmed.

Issued: October 26, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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

¹⁵ Appellant contends that he is unable to work due to his emotional condition. However, there is no evidence in the record until one year after he rejected the suitable work offer that he had an emotional condition. *Compare* Dr. Rossario's October 20, 1998 opinion finding that appellant did not have the ability to perform gainful employment for the employing establishment with the date of termination of benefits on September 2, 1997. There is no contemporaneous evidence that as of September 2, 1997 appellant had an emotional condition that prevented him from working the lobby monitor position when it was offered to him. The Office has not accepted this as employment related.