United States Department of Labor
Employees' Compensation Appeals Board

G.M., Appellant	)	
and	)	**Docket No. 06-1953**
	)	**Issued: August 13, 2007**
U.S. POSTAL SERVICE, WEST TRENTON POST OFFICE, Ewing, NJ, Employer	)	

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 August 22, 2006 appellant filed a timely appeal from the June 5, 2006 merit decision of the Office of Workers' Compensation Programs terminating his compensation on the grounds that he refused an offer of suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether the Office properly terminated appellant's wage-loss compensation on the grounds that he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On December 6, 2001 appellant, then a 57-year-old custodian (labor/maintenance), filed an occupational disease claim alleging that he sustained pain in his left side, back and shoulders as a result of the stress placed on his body during his federal employment. The Office accepted the claim for aggravation of a degenerative cervical intervertebaral disc, aggravation of traumatic arthroplasty of the lower left leg and aggravation of sprains/strains of hip and thigh. An

arthroplasty was interpreted as showing gross and microscopic changes consistent with degenerative joint disease. Appellant moved to Florida in November 2003. He continued to receive compensation benefits.

Appellant commenced treatment with Dr. Julio Robla, a Board-certified orthopedic surgeon, on December 1, 2003. In a report dated February 10, 2004, Dr. Robla listed his impression as "[l]eft total knee arthroplasty improving clinically with good range of motion and improved functional outcomes." On the same date, he indicated that appellant could do no prolonged squatting or kneeling and could not lift or carry greater than 20 pounds.

On September 28, 2004 the Office referred appellant to Dr. Jerry S. Sher, a Board-certified orthopedic surgeon, for a second opinion. In a report dated August 21, 2004, Dr. Sher diagnosed appellant with osteoarthritis of the left knee, status post total knee replacement, osteoarthritis of the left hip, mild and lumbar degenerative disc disease. He opined that the work-related aggravation had resolved and that there were no objective findings to show that appellant's current degenerative condition continued to be related to the accepted work factors of November 2001. Dr. Sher explained:

> "[Appellant's] occupational injury resulted in a temporary aggravation of his preexisting degenerative conditions with regard to his hip and back. This temporary aggravation would have ceased three months after the date of his injury. [Appellant's] knee reflects a permanent aggravation which required more aggressive treatment and ultimately total knee replacement."

He noted that appellant was capable of performing work in a modified capacity. Dr. Sher advised that appellant was limited to squatting, kneeling and climbing for two to three hours a day. He also noted that squatting was limited to 10 pounds and climbing of no more than 5 pounds. The Office found a conflict in medical opinion between Dr. Robla and Dr. Sher as to whether appellant had any continuing residuals of his accepted conditions and his capacity for work.

On November 8, 2004 the Office referred appellant to Dr. Sile Randolf Lestrange, a Board-certified orthopedic surgeon, selected as the impartial medical specialist. In a report dated December 7, 2004, Dr. Lestrange stated:

> "[Appellant] is probably able to work as a custodian, but has some other limitations as far as standing for long periods, climbing and squatting. He expressed the desire to work as a security guard, for example, on a Brink's Truck and he understands that this would require some walking and sitting and some climbing. [Appellant] apparently feels that he would be able to do this. He is not working at the present time. Because of his age, physical habitus and radiographic findings exclusive of any MRI [magnetic resonance imaging] [scan] findings which may change the following opinion, [appellant] is probably able to do light lifting, but unable to do repetitive heavy lifting at this time. [Appellant] could probably work light duty and certainly part time and probably full time.

On January 25, 2005 Dr. Lestrange noted that appellant's MRI scan showed bulging discs at multiple levels, particularly at L5-S1 and L4-5, but no definite herniated discs. On February 22, 2005 he noted that appellant's MRI scan of his left hip was normal.

On April 22, 2005 the Office received a letter from the branch of the employing establishment in south Florida stating that it was unable to identify a modified-job assignment within appellant's physical restrictions.

On May 9, 2005 the employing establishment offered appellant a position as a modified custodian laborer in West Trenton, New Jersey, the branch where he was injured. The physical requirements of the position included intermittent walking and standing (up to four hours), bending/stooping, kneeling and climbing (up to two hours) and pushing, pulling and lifting six hours a day up to 20 pounds.

By letter dated May 23, 2005, the Office informed appellant that the position offered by the employing establishment as a modified custodian in Trenton, New Jersey was considered suitable and that he had 30 days to either accept the position or provide reasons for refusing it. On June 1, 2004 appellant retired from the Federal Government. On June 10, 2005 he rejected the modified assignment. Appellant explained that he now lived in Florida had a home there and had gone to college to get his license as a security officer.

By letter dated June 16, 2005, the Office informed appellant that his relocation and attending college were not acceptable reasons for refusing suitable work. Appellant was advised that, if he elected not to accept the job offer, he would not be entitled to any further compensation, including a schedule award. The letter did note that he would still be entitled to medical benefits.

Appellant commenced employment with State Security Service on May 20, 2005 earning $8.39 per hour. He worked 80 hours biweekly.

On June 29, 2005 the Office informed appellant that he had not provided a valid excuse for refusing to accept the offered position and provided him 15 extra days to accept the position. The Office noted that the job offer included relocation expenses.

In a July 18, 2005 decision, the Office terminated appellant's compensation benefits because he refused suitable employment. It noted that the security guard position paid less than appellant could earn in the position offered by the employing establishment.

On July 9, 2005 appellant requested an oral hearing before an Office hearing representative.

At a hearing held on April 26, 2006, appellant testified that he went to school at Miami Dade College to become a licensed security officer. He noted that he understood that, when he went back to work, he would no longer receive compensation benefits but that he did expect to receive his schedule award.

In a decision dated June 5, 2006, the hearing representative affirmed the Office's July 18, 2005 decision.

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for him is not entitled to compensation.[1] The Board has found that a refusal to accept suitable work constitutes a bar to the receipt of a schedule award for any impairment which may be related to the accepted injury.[2] The Office has the authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth 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.[3] In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.[4] An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[5]

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 as reasonable or justified and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.[6] 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.[7]

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.[8] 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

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[1] 5 U.S.C. § 8106(c)(2).

[2] *See Stephen R. Lubin*, 43 ECAB 564, 573 (1992).

[3] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

[4] *Glen L. Sinclair*, 36 ECAB 664 (1985).

[5] 20 C.F.R. § 10.124; *see Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

[6] 20 C.F.R. § 10.517(a) (1999); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(5) (July 1997).

[7] *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[8] *See Marilyn D. Polk*, 44 ECAB 673 (1993).

care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[9]

It is well established that, when 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 proper factual and medical background, must be given special weight.[10]

ANALYSIS

To terminate appellant's compensation benefits due to refusal to accept suitable work, the Office has the burden of establishing that the offered position was suitable and that appellant was informed of the consequences of failing to accept this work. The position offered was that of modified custodian. The physical requirements were intermittent walking and standing; no more than two hours of bending/stooping, kneeling and climbing; and pushing, pulling and lifting limited to six hours a day and no more than 20 pounds. The impartial medical examiner, Dr. Lestrange, who was selected to resolve a conflict in medical opinion between appellant's attending physician, Dr. Robla, and the second opinion specialist, Dr. Sher, regarding appellant's wage-earning capacity, indicated that appellant could "probably work as a custodian with limitations as far as standing for long periods, climbing and squatting." He indicated that appellant was "probably able to do some light lifting" and could "probably work light duty" on a part-time and full-time basis.

The Board finds that Dr. Lestrange's report is not well rationalized as to appellant's capacity for work. His reports do not form a valid basis for the work suitability determination. Dr. Lestrange consistently used the term "probably" to describe appellant's ability to perform the work of a modified-duty custodian, concluding that he "probably" could do light work. The Board has held that medical opinion evidence which is couched in speculative language is of diminished probative value.[11] The Board, therefore, finds that the Office improperly relied on Dr. Lestrange's report because of its speculative nature.

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits based on his refusal to accept suitable work due to an unresolved conflict in the medical evidence. Accordingly, the Board will reverse the Office's June 5, 2006 decision.

CONCLUSION

The Board finds that the opinion of Dr. Lestrange was too speculative to constitute the special weight of the medical evidence. Therefore, there remains an unresolved conflict of medical opinion evidence preventing the Office from meeting its burden of proof to terminate appellant's compensation benefits.

[9] *See Connie Johns*, 44 ECAB 560 (1993).

[10] *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

[11] *Kathy A. Kelley*, 55 ECAB 206, 211 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 5, 2006 is reversed.

Issued: August 13, 2007
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