United States Department of Labor
Employees' Compensation Appeals Board

R.C., Appellant	)	
and	)	**Docket No. 07-1012**
	)	**Issued: February 13, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Whittier, CA, Employer	)	

Appearances:
Linda Temple, for the appellant
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 March 5, 2007 appellant filed an appeal of decisions of the Office of Workers' Compensation Programs dated May 8 and December 19, 2006, which terminated his wage-loss compensation on the grounds that he refused an offer of suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office properly terminated appellant's wage-loss compensation effective May 13, 2006 pursuant to 5 U.S.C. § 8106(a). On appeal, appellant's representative contends that the offered position was not suitable because it was outside appellant's physical restrictions and was withdrawn.

FACTUAL HISTORY

On July 26, 1990 appellant, then a 40-year-old letter carrier, sustained an employment-related lumbosacral sprain.[1] In 1994, he underwent a discectomy. Due to complications,

[1] The instant claim was adjudicated by the Office under file number 130926742.

appellant had corrective surgery in 1996. On June 16, 1999 he underwent an L5-S1 fusion procedure. Appellant had intermittent periods of disability and was off work from March 12, 1992 to October 13, 2000, when he returned to a limited-duty assignment. Under Office file number 132031838, the Office accepted that appellant sustained left lower limb mononeuritis as a result of a fall on June 29, 2001. Appellant stopped work on October 18, 2001 following an episode of weakness at home. He was returned to the periodic rolls.

Appellant came under the care of Dr. Khalid B. Ahmed, a Board-certified orthopedic surgeon, who performed the 1994 surgery and on December 10, 2001 reported that he stopped work due to unrelenting discomfort. On January 4, 2002 appellant fell at home fracturing his right collarbone. Dr. Ahmed submitted additional reports advising that appellant could not work. He requested a dorsal spinal cord stimulator implant for pain management.

On January 29, 2004 the Office referred appellant to Dr. J. Pierce Conaty, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a February 26, 2004 report, Dr. Conaty noted his review of the statement of accepted facts, medical record and history of present illness as provided by appellant. He noted that appellant used a cane for all ambulatory activities and listed findings on physical examination. Dr. Conaty diagnosed failed back syndrome with ongoing back pain and residual objective findings of limited range of motion, surgical residuals, x-ray changes and bilateral neural deficits consisting of weakness of the left lower extremity and hyperesthesia which were due to the July 26, 1990 injury and subsequent treatment. Dr. Conaty opined that appellant's prognosis was guarded but that he might experience a reduction in pain with the spinal cord stimulator. He concluded that appellant was capable of working a four-hour day. In an attached work capacity evaluation, Dr. Conaty advised that appellant could work very limited duty for four hours a day with permanent restrictions of four hours sitting, one hour walking and standing, no bending, stooping, lifting or operating a motor vehicle at work and a 10-pound weight restriction on pushing and pulling for one-half hour daily.

On March 30, 2004 the employing establishment offered appellant a position as a lobby director providing assistance to customers. The physical requirements of the position confirmed to those provided by Dr. Conaty. By letter dated March 31, 2004, the Office advised that a partially disabled employee who refused suitable work was not entitled to compensation and that the offered position was suitable. He was notified of the penalty provisions of section 8106 of the Federal Employees' Compensation Act[2] and given 30 days to respond.

On May 13, 2004 appellant notified the Office that he would return to work. In an April 1, 2004 report, Dr. Ahmed advised that he did not approve the job offer because appellant had severe back pain and needed additional surgery. On May 11, 2004 he noted that he continued to be totally disabled. On May 12, 2004 he advised that appellant could return to work with restrictions on May 17, 2004.

On May 24, 2004 the Office advised appellant that his reasons for refusing the offered position were not acceptable. Appellant was given an additional 15 days to respond. Dr. Ahmed continued to advise that appellant could not work.

[2] 5 U.S.C. §§ 8101-8193.

By report dated November 24, 2004, Dr. Jack H. Florin, Board-certified in neurology, advised the employing establishment that appellant was seen for continuation of medication. He diagnosed chronic L5-S1 radiculopathy; seizure disorder, controlled; hypertension, not controlled; and tremulousness due to possible alcohol withdrawal.[3]

The Office determined that a conflict in medical evidence arose between Dr. Ahmed and Dr. Conaty regarding appellant's ability to work. On February 17, 2005 it referred him to Dr. Bill W. Yeung, Board-certified in orthopedic surgery, for an impartial medical evaluation.[4]

By report dated March 9, 2005, Dr. Yeung noted his review of the history of injury and medical records. Appellant complained of frequent mild pain, numbness and weakness in the left leg with occasional giving way even with the use of a single point cane. He observed that appellant appeared to move well with the cane and provided extensive physical findings. Dr. Yeung's impression was permanent spinal cord nerve root injuries at L5-S1, post laser discectomy, with residual low back pain, left leg weakness and numbness. He opined that appellant sustained permanent damage at the L5-S1 level due to the 1994 discectomy performed by Dr. Ahmed with a significant down-hill course. Dr. Yeung advised that the most significant findings on clinical examination were gross edema of both legs, noting that appellant had a probable history of alcoholic cirrhosis of the liver/hepatitis with abnormal platelets. He opined that the progressive weakness and numbness of appellant's lower extremities were the result of a deteriorating liver condition and/or alcoholic neuropathy and advised that appellant declined an up-to-date neurological examination. Dr. Yeung stated that, without neurological examination, appellant's lumbar spine condition was improving and was permanent and stationary. However, the left leg/lower extremity complaints and findings due to the 1994 surgical procedure, combined with contributions from appellant's additional medical complaints of seizure disorder, varicose veins, hypertension, heart disease, hepatitis and cirrhosis of the liver, would continue to progress. He advised that appellant could return to modified work, including the lobby director's position, for six hours a day with a probable progression to eight hours. Dr. Yeung noted that appellant required the use of a single point cane and was limited from prolonged walking or standing and should have a semi-sitting job with no driving, frequent bending, stooping, lifting carrying, pulling, pushing, climbing stairs or walking on slippery or uneven ground. He advised that the prospect of falling could be eliminated by the use of a wheelchair and that requirements for getting up and down should be minimal. Dr. Yeung opined that, while the dorsal column implant could decrease pain, it was of no value in reversing weakness and was contraindicated in appellant based on his liver enzyme and platelet abnormalities due to the risk of uncontrollable bleeding. He agreed with Dr. Conaty's opinion and found no progressive deterioration in appellant's low back or left leg since his examination, other than the significant edema. In a work capacity evaluation, Dr. Yeung advised that appellant could work 6 hours a day with permanent restrictions of 6 hours sitting, 1 hour of walking, standing and reaching and 4 hours of lifting 10 pounds and no reaching above the shoulder, twisting, bending, stooping, operating a motor vehicle at work, pushing, pulling, squatting, kneeling or climbing and that he should take

[3] Dr. Florin had provided reports for the employing establishment on June 27, 2001 and April 24, 2003.

[4] Drs. Conaty and Yeung were provided with a statement of accepted facts, a set of questions and the medical record.

5-minute breaks every 30 minutes. A March 9, 2005 left knee x-ray was normal, lumbar spine x-ray demonstrated operative changes and pelvis x-ray demonstrated mild degenerative changes.

On June 23, 2005 the Office proposed to suspend appellant's compensation benefits because he did not follow-up with Dr. Yeung as directed.[5] By report dated July 6, 2005, Dr. Ahmed advised that appellant could work three to four hours daily and provided permanent restrictions of three to four hours sitting, one hour walking and standing, no bending, stooping, lifting or operating a motor vehicle and one-half hour of pushing and pulling.

On September 15, 2005 the employing establishment offered appellant a limited-duty job as badge checker from 12:00 noon to 5:00 p.m. daily. The description provided that appellant would sit in a chair at the front gate of the employing establishment and check drivers' licenses and postal identification of those entering the front gate. He was required to open the gate and keep a record of license plates and times of arrival. The physical restrictions comported with those provided by Dr. Ahmed in his July 6, 2005 report. On September 28, 2005 appellant refused the offered position.

A January 27, 2006 telephone conference was held between the Office and the employing establishment regarding whether appellant would be offered a limited-duty job based on Dr. Yeung's recommendations. On February 16, 2006 appellant was again offered the position of badge checker for six hours a day from 7:00 a.m. to 2:00 p.m. with the additional duty that he was required to check all badges and make sure that all who entered registered in a log. The restrictions were that he could sit for six hours, walk, stand and reach for one hour, lift 10 pounds for four hours with no reaching above the shoulders, twisting, bending, stooping, pushing, pulling, squatting, kneeling or climbing and no operation of a motor vehicle. On February 16, 2006 the Office ascertained that the position remained available and by letter that day informed appellant that the offered position was suitable and informed him of the penalty provisions of section 8106 of the Act. Appellant was given 30 days to respond. On March 9, 2006 the Office determined that the job was still available and advised appellant that his reasons for refusing the offered position were not acceptable. Appellant was given an additional 15 days to respond.

By report dated February 14, 2006, received on March 9, 2006, Dr. Ahmed reiterated his request for a trial of a dorsal implant due to the severity of appellant's low back pain. He advised that appellant should remain on total disability "pending further evaluation and care." In a March 9, 2006 decision, the Office denied the request for the dorsal implant on the grounds that Dr. Yeung recommended against it.[6] On March 22, 2006 appellant advised the Office that he would report to work. On March 24, 2006 he accepted the offered position. He returned to work that day and continued to receive wage-loss compensation for two hours a day.

In a letter dated March 24, 2006, Nancy Lemus, nurse manager at the employing establishment, scheduled a fitness-for-duty examination with Dr. Randy Jones. Ms. Lemus explained that, based on the reports of appellant's attending physician Dr. Ahmed, and Dr. Yeung, the referee physician, appellant was offered a modified-duty position. On March 24,

[5] The record indicates that appellant missed three follow-up appointments.

[6] Appellant, who is represented, did not file an appeal with the Board of this decision.

2006 a return to work committee met with him to explain the job. She and two others, including William Magallanes, appellant's supervisor, escorted appellant to the gate where he would work and indicated that he walked with a cane and had to stop several times because he said he was shaking due to dizziness. Mr. Magallanes told appellant to go home and that, while he was initially advised to return to work the following Monday, the committee determined that he should get a fitness-for-duty examination prior to beginning his work duties. The appointment with Dr. Jones was cancelled by the employing establishment.

On March 28, 2006 the employing establishment advised the Office that it had concerns about appellant's ability to work. On April 5, 2006 the Office determined that the position was still available. In a letter that day, it informed appellant that the offered position was suitable and of the penalty provisions of section 8106 of the Act. He was given 30 days to respond. On April 7, 2006 appellant submitted a Form CA-7, claim for compensation, for the period beginning March 24, 2006.[7] On April 7, 2006 he informed the Office that he had not been called by the employing establishment regarding a return to work. On April 11, 2006 the Office called the employing establishment and advised that someone should call appellant regarding his return to work. On April 19, 2006 the Office advised the employing establishment that it should send appellant a letter regarding his return to work.

In a report dated May 4, 2006, Dr. Ahmed noted appellant's report that he was unable to perform work duties on March 24, 2006. He advised that appellant had objective physical findings of restricted lumbar spine mobility with tightness, spasm and tenderness, and weakness in foot dorsiflexion, plantar flexion, eversion, inversion, knee flexion, and hip abduction, adduction, flexion and extension. Dr. Ahmed diagnosed lumbar disc herniation with radiculitis/radiculopathy and anxiety and depression and advised that appellant was totally disability due to the severity of his pain. He again recommended the dorsal implant.

On May 8, 2006 the Office determined that the offered position remained available.

By decision dated May 8, 2006, the Office terminated appellant's monetary compensation benefits, effective May 13, 2006, on the grounds that he declined an offer of suitable work. A telephone memorandum dated August 1, 2006 reported that appellant's union representative advised the Office that he had not been given a return to work date by the employing establishment.

On September 22, 2006 appellant, through his representative, requested reconsideration. In an August 10, 2006 letter, he described the events of March 24, 2006, stating that he met with Mr. Magallanes, Phillip Solis, the injury compensation specialist, Romel Daliva, a manager and Ms. Lemus. His job duties were described and he was escorted to the main gate where he would work on the outside with no protection from the sun. Appellant stated that he told Mr. Magallanes that, even though he was in pain, he would work his shift. However, Mr. Magallanes told him to go home and that he would be called regarding his return to work. After March 28, 2006, he repeatedly called the employing establishment. On April 12, 2006 appellant talked with Mr. Magallanes, who again said he would call later regarding appellant's return to work but that he did not hear further from the employing establishment.

[7] He continued to submit CA-7 form claims.

In a report dated July 18, 2006, Dr. Ahmed noted that his review of medical records including Dr. Yeung's report. He opined that Dr. Yeung made many inappropriate comments regarding appellant's treatment and care and disagree with his conclusion that the laser discectomy performed in 1994 was disastrous. Dr. Ahmed advised that appellant had failed low back syndrome with a primary problem of lumbar radiculopathy and leg pain. He recommended pain management.

In employing establishment e-mails dated March 24, 2006, Mr. Magallanes and Mr. Solis discussed appellant's return to work that day. Mr. Magallanes stated that he noted that appellant walked very slowly with a cane. He described the meeting, stating that at times appellant was nervous and shaking and stated that he was drowsy from medication he had taken. Mr. Magallanes reported that appellant had problems stepping on and off the curb in the work area and became dizzy when walking. After observing appellant, he felt it would be unsafe for him to work that day and told him to go home. Mr. Solis agreed that appellant appeared unstable and unable to perform his assigned duties.

By notice dated June 16, 2006, signed by Mr. Magallanes, the employing establishment proposed to separate appellant because he was found to be unfit for duty on March 24, 2006 based on "your own admission and my observation." In a June 26, 2006 response, appellant advised the employing establishment that he was capable of working with medical restrictions and asked that he be notified regarding a return to work. In an August 28, 2006 report, Ms. Lemus again noted that, on March 24, 2006, appellant stated that he felt dizzy and was visibly shaking. Appellant walked with a cane and, when walking to the proposed duty station, had to stop several times. He had difficulty stepping off the curb when asked to show that he could take inventory of cars entering the employing establishment. Ms. Lemus concluded that he did not appear stable on his feet and recommended a fitness-for-duty examination which was scheduled but cancelled "for reasons unbeknownst to me."

By decision dated December 19, 2006, the Office denied modification of the May 8, 2006 decision.

LEGAL PRECEDENT

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."[8] 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.[9] The implementing regulations 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.[10] To justify termination, the Office must show that

[8] 5 U.S.C. § 8106(c).

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

[10] 20 C.F.R. § 10.517(a).

the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[11] In determining what constitutes "suitable work" for a particular disabled employee, the Office considers the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors.[12] Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.[13] 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.[14] 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.[15] It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.[16]

ANALYSIS

The Board finds that the Office improperly terminated appellant's monetary compensation effective May 13, 2006 on the grounds that he refused an offer of suitable work. The record in this case demonstrates that a modified position of badge checker was developed for appellant within the restrictions provided by Dr. Yeung, the referee physician. The position was offered to appellant on February 16, 2006. The Board, however, finds that Dr. Yeung's report, does not clearly establish whether appellant could perform the job duties of a badge checker. Dr. Yeung advised that, because appellant was unsteady on his feet, he could use a wheelchair at work and recommended a semi-sitting job with a minimum of getting up and down and no walking on uneven ground. Dr. Yeung reviewed the position description of a lobby director, work performed indoors providing assistance to customers. The offered position, however, was as a badge checker in which appellant would work outside at the main gate of the employing establishment and check vehicles and identification of those entering the employing establishment. While a chair was provided, he is cane dependent and he would have to get up and step up and down a curb to check identification and record license numbers and have those entering log-in. The duties of the offered position appear to be at variance with those provided to Dr. Yeung for his review. His report is not sufficient to establish that appellant has the physical ability to perform the modified position.[17]

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

[12] 20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB 681 (2004).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5.a(1) (July 1997); *see Lorraine C. Hall*, 51 ECAB 477 (2000).

[14] *Gloria G. Godfrey*, 52 ECAB 486 (2001).

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

[16] *Richard P. Cortes*, 56 ECAB 200 (2004).

[17] *Id.*

For the foregoing reasons, the Board concludes that appellant did not decline or abandon suitable work and the Office improperly terminated his monetary compensation.[18]

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's monetary compensation effective May 13, 2006 pursuant to section 8106(c) of the Act on the grounds that he refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 19, 2006 be reversed.

Issued: February 13, 2008
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

[18] The Board also notes that, following its April 5, 2006 letter notifying appellant of the penalty provisions of section 8106, he submitted a report from Dr. Ahmed advising that he was totally disabled. In such a case, if the Office deems Office continued refusal unjustified, appellant should be provided an additional 15 days to respond. *See Maggie L. Moore*, *supra* note 11. The Office did not provide appellant an additional 15-day notice prior to terminating his monetary compensation effective May 13, 2006.