United States Department of Labor
Employees' Compensation Appeals Board

G.B., Appellant	)	
and	)	**Docket No. 07-1783**
	)	**Issued: February 6, 2008**
DEPARTMENT OF VETERANS AFFAIRS, HINES VETERANS HOSPITAL, Chicago, IL, 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 June 25, 2007 appellant filed a timely appeal of the Office of Workers' Compensation Programs' hearing representative's merit decision dated June 27, 2006 finding that he refused an offer of suitable work and a nonmerit decision dated September 20, 2006. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit issues of this case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation benefits on the grounds that he refused an offer of suitable work; and (2) whether the Office properly declined to reopen appellant's claim for reconsideration under section 8128(a) of the Federal Employees' Compensation Act.

FACTUAL HISTORY

On April 17, 2002 appellant, then a 46-year-old housekeeping aide, sustained injury to his left knee when he slipped and fell while mopping the floor. He underwent left knee surgery

entailing an arthroscopic partial meniscectomy of the posterior horn of the medial meniscus. The Office accepted appellant's claim for left medial meniscal tear and surgery on December 31, 2002. Appellant received continuation of pay from April 18 to 27, 2002 and compensation beginning November 13, 2002. He returned to light-duty work on April 28, 2003.

Appellant filed a recurrence of disability claim on March 10, 2004 alleging that on March 3, 2004 he stopped work due to his April 16, 2002 employment injury. The Office accepted this claim on March 19, 2004. In a report dated March 2, 2004, Dr. Luz M. Banuelos, an attending Board-certified orthopedic surgeon, opined that appellant's work restrictions of no mopping, kneeling, crawling, squatting or walking more than 20 minutes an hour and working four hours a day were permanent. The employing establishment offered him a light-duty position on June 22, 2004. Appellant declined this position.

Appellant filed a second recurrence of disability on July 22, 2004 and stopped work on July 19, 2004 due to his April 16, 2002 employment injury. Dr. Samuel Chmell, an attending Board-certified orthopedic surgeon, examined appellant on August 17, 2004 and found him unable to work due to right knee pain. He found medial joint line tenderness, decreased range of motion of the left knee and medial joint space narrowing on x-ray. Dr. Chmell diagnosed left knee degenerative joint disease of the medial compartment and recommended a high tibial osteotomy.

Appellant alleged a recurrence of total disability on September 22, 2004. Dr. Amit Shaton, an internist, diagnosed knee pain after physical testing. Appellant consulted the orthopedic surgery clinic and was found totally disabled from September 28 through October 10, 2004. Dr. Shaton provided restrictions of desk work, medium level with lifting 20 to 50 pounds occasionally, 10 to 25 pounds frequently and no more than 10 pounds constantly. He noted that appellant stated that he was unable to work eight hours a day and recommended an evaluation prior to determining appellant's work capacity. In a note dated October 13, 2004, Dr. Chmell listed appellant's restrictions as no kneeling, squatting, crawling, mopping or twisting. He indicated that appellant should stand and walk less than 20 minutes. Appellant was not to lift or push more than 20 pounds and should not work more than four hours a day. The Office accepted this recurrence claim on October 25, 2004.

Dr. Chmell examined appellant on September 28, 2004 noting that he complained of pain following a functional capacity examination and requested a work release note. He found medial joint line tenderness and decreased range of motion of the left knee. Dr. Chmell suggested that appellant seek a psychiatric evaluation and reduce his work hours to four hours a day.

The Office referred appellant for a second opinion evaluation on October 20, 2004. In a report dated November 18, 2004, Dr. Edward S. Forman, an osteopath, noted appellant's history of injury and reviewed Dr. Chmell's October 13, 2004 note. He examined appellant and found no effusion in the left knee, no drawer or Lachman's signs and a negative McMurray test. Dr. Forman found no crepitance on range of motion testing. He examined appellant's x-rays and found minimal medial joint space narrowing. Dr. Forman diagnosed right knee pain with early degenerative joint disease following a partial medial meniscectomy. He found that appellant's subjective complaints strongly outweighed his objective findings and that the arthritic changes found on x-ray preexisted appellant's accepted employment injury. Dr. Forman recommended a

functional capacity evaluation and opined that appellant could work eight hours a day with restrictions of limited lifting, squatting, kneeling and climbing with the left lower extremity. He indicated that appellant had reached maximum medical improvement.

Appellant filed an additional claim on December 22, 2004. In a note dated December 21, 2004, Dr. Chmell indicated that appellant was totally disabled for one week due to increased knee pain. He was then released to return to work with his existing restrictions. On January 19, 2005 Dr. Chmell indicated that appellant should work only three hours a day.

The Office found a conflict of medical opinion evidence regarding appellant's ability to work and his current medical status. It referred him for an impartial medical examination with Dr. John J. Dwyer, a Board-certified orthopedic surgeon. In a report dated March 8, 2005, Dr. Dwyer noted appellant's history of injury. On examination, he found good quadriceps strength in both lower extremities. Dr. Dwyer found no atrophy and 55 degrees of flexion on the left. He stated that the McMurray sign was negative, that there was no grinding on the left side and that Drawer, Slocum and Fairbank's tests were negative. Dr. Dwyer noted swelling in the lateral joint space on the right. He stated that no x-rays were available and that he would review any films provided. Dr. Dwyer stated, "[O]n the basis of this examination appellant is capable of performing all the activities of daily living and occupational requirements of the job description and should be afforded the opportunity to do such. [Appellant] may require some rehab[ilitation] work hardening, work condition and concomitant functional capacity analysis and dynametric test of the left knee." The Office requested that Dr. Dwyer complete a work-restriction evaluation form on June 8, 2005. On June 13, 2005 Dr. Dwyer completed the form and indicated that appellant could work eight hours a day with restrictions on walking and standing for three or four hours, reaching and twisting for three hours, pushing, pulling and lifting up to 50 pounds and no squatting, kneeling or climbing. Dr. Dwyer indicated that appellant could perform repetitive movements of the wrist for 6 hours and that he should have a 20 minute break every 3 hours.

The employing establishment offered appellant a light-duty position as a modified housekeeping aid on August 3, 2005 working eight hours a day. The physical requirements of this position included sitting up to eight hours a day, standing up to four hours a day, reaching up to four hours a day and twisting four hours a day, pushing and pulling up to six hours a day and lifting up to 50 pounds. Appellant declined the position on August 19, 2005 and disagreed with Dr. Dwyer's opinion regarding his ability to work.

In a letter dated October 17, 2005, the Office informed appellant that the modified housekeeping position was suitable work and allowed him 30 days to accept the position or provide his reasons for refusal. Appellant responded on November 15, 2005 and resubmitted the work limitations set forth by Dr. Chmell. In a letter dated November 17, 2005, the Office advised him that his reasons for refusing the offered position were not valid and allowed him an additional 15 days to accept the position. In response, appellant indicated on November 23, 2005 that justice should take its course.

By decision dated December 9, 2005, the Office terminated appellant's compensation benefits on the grounds that he refused an offer of suitable work. The Office found that

Dr. Dwyer's report constituted the weight of the medical opinion evidence and established that appellant was medically capable of performing the duties of the offered position.

Appellant requested an oral hearing which was held on December 24, 2005. He disagreed with Dr. Dwyer's findings. Following the oral hearing, appellant submitted a report dated May 2, 2006 from Dr. Chmell who found a left knee effusion, medial tenderness and diminished motion. Dr. Chmell stated, "The most significant thing in today's evaluation was the x-ray which shows varus malalignment and medial joint bone-on-bone contact." He concluded that appellant required work restrictions of sitting three hours a day and knee replacement surgery.

By decision dated June 27, 2006, the hearing representative affirmed the Office's January 15, 2004 decision. She found that Dr. Dwyer's report was entitled to the weight of the medical evidence and that the Office met its burden of proof to terminate appellant's compensation benefits based on his refusal of a suitable work position.

Appellant requested reconsideration on September 20, 2006. In a report dated May 2, 2006, Dr. Harold Bach, a Board-certified orthopedic surgeon, diagnosed bilateral knee degenerative joint disease. He found crepitance and decreased range of motion in appellant's knees. Dr. Bach reviewed x-rays dated May 2, 2006 and found significant medial joint space narrowing as well as osteophyte worse in the left knee than the right. Dr. Chmell completed a report on August 14, 2006 noting appellant's employment injury and stating that appellant was asymptomatic and had no restrictions or impairments prior to the April 2002 employment injury. He noted that appellant had a torn medial meniscus and very mild degenerative changes in the medial compartment of his left knee at the time of his arthroscopy. Dr. Chmell stated that appellant's left knee continued to deteriorate with progressive worsening of degenerative arthritis. He found an effusion of the left knee with marked medial joint line tenderness and tenderness of the medial femoral condyle. Dr. Chmell diagnosed torn medial meniscus left knee with arthroscopy and partial medial meniscectomy. He also diagnosed "traumatic aggravation of degenerative arthritis, left knee secondary to … work injury" and "traumatic arthritis, left knee." Dr. Chmell opined that appellant had sustained a consequential injury to his right knee of aggravation of osteoarthritis due to his accepted employment injury. He reviewed appellant's diagnostic studies including a November 3, 2003 magnetic resonance imaging (MRI) scan and an October 24, 2002 MRI scan. Dr. Chmell stated,

> "The November 3, 2003 MRI scan demonstrated partial medial meniscectomy but more importantly, it demonstrated 'progression of degenerative joint disease in the medial compartment of the knee.' This is clear, 100 percent objective indication of rapid progression of the arthritis of the medial compartment of [appellant's] left knee."

Dr. Chmell opined that appellant could not return to his regular job and that he required permanent restrictions in his activities.

By decision dated December 12, 2006, the Office declined to reopen appellant's claim for consideration of the merits. It stated that the evidence submitted was not relevant to the issue.

LEGAL PRECEDENT -- ISSUE 1

Section 8106(c)(2) 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.[1] However, to justify such termination, the Office must show that the work offered was suitable.[2] 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.[3]

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.[4] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[5] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[6]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a left medial meniscal tear and surgery including a partial medial meniscectomy and paid appropriate compensation for periods of total and partial disability. Appellant's physicians limited him to working four hours a day with restrictions on March 2, 2004. Dr. Chmell, a Board-certified orthopedic surgeon, found medical joint space narrowing on x-ray and diagnosed left knee degenerative joint disease of the medial compartment and recommended a total knee replacement.

The Office referred appellant for a second opinion evaluation and Dr. Forman, an osteopath, diagnosed early degenerative joint disease following a partial medial meniscectomy based on examination of appellant's x-rays. He opined that appellant's arthritic changes preexisting appellant's employment injury and that appellant could work eight hours a day with restrictions.

The Office properly found a conflict of medical opinion evidence regarding appellant's current medical status and his ability to work and referred him for an impartial medical evaluation with Dr. Dwyer, a Board-certified orthopedic surgeon. In a report dated March 8, 2005, Dr. Dwyer reviewed appellant's history of injury and performed a physical examination.

[1] 5 U.S.C. §§ 8101-8193, 8106(c).

[2] *M.S.*, 58 ECAB ___ (Docket No. 06-797, issued January 31, 2007).

[3] *Id.*

[4] 5 U.S.C. § 8123(a).

[5] *William C. Bush*, 40 ECAB 1064, 1975 (1989).

[6] *Jack R. Smith*, 41 ECAB 691, 701 (1990).

He specifically noted that the Office had not provided him with x-rays and that he would be happy to review any diagnostic studies. Dr. Dwyer opined, based solely on his physical evaluation that appellant was capable of performing his date-of-injury position. He also noted that appellant might require "some rehab[ilitation] work hardening, work condition and concomitant functional capacity analysis and dynametric test of that left knee." Dr. Dwyer completed a work restriction evaluation three months after his initial evaluation and found that appellant could work eight hours a day with restrictions.

Dr. Dwyer's report is not sufficiently detailed and rationalized to warrant the weight of the medical evidence and resolve the conflict of medical opinion evidence regarding appellant's current medical status and his ability to work. Dr. Dwyer was not provided with appellant's diagnostic studies which were reviewed by both Dr. Chmell and Dr. Forman in reaching their respective opinions regarding whether appellant's degenerative joint disease was due to his partial meniscectomy or was a preexisting condition. Without diagnostic studies including any x-rays or MRI scan regarding appellant's left knee reviewed by the other physicians, Dr. Dwyer was not in a position to render a fully informed opinion regarding appellant's current medical status. Furthermore, while Dr. Dwyer stated in his narrative report that appellant could return to work eight hours a day, he seemed to suggest that additional efforts were likely to be necessary to reach such a return to an eight-hour workday. Dr. Dwyer stated that appellant might require work hardening, work conditioning and a functional capacity analysis and dynametric testing of his left knee. There is no evidence that Dr. Dwyer took this aspect of appellant's rehabilitation process into account in completing the work restriction evaluation three months after his initial evaluation of appellant. The Office did not clarify whether these efforts would be necessary before appellant could return to work for eight hours a day within the restrictions specified by Dr. Dwyer who also failed to provide any medical reasoning explaining why he felt that appellant's physical examination provided a sufficient basis for determining his current physical condition and his ability to work. Dr. Dwyer merely offered the statement that on the basis of his examination appellant could return to work eight hours a day.

As Dr. Dwyer's report did not include an examination of appellant's diagnostic testing such as x-rays and MRI scans, as he initially appears to qualify his opinion that appellant could currently return to work eight hours a day by suggesting additional work hardening, testing and conditioning and as he failed to provide any medical reasoning in support of his opinion that could return to work eight hours a day, this report is not sufficient to resolve the existing conflict of medical opinion evidence and may not serve as the basis for determining whether appellant was offered a suitable work position.[7]

CONCLUSION

The Board finds that the medical evidence of record is not sufficient to establish that appellant refused a suitable work position and that therefore the Office failed to meet its burden of proof to terminate his compensation benefits under section 8106(c) of the Act.

[7] Due to the disposition of this issue, it is not necessary for the Board to address whether the Office properly declined to reopen appellant's claim for consideration of the merits on September 20, 2006.

ORDER

IT IS HEREBY ORDERED THAT the September 20 and June 27, 2006 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: February 6, 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