

FACTUAL HISTORY

On January 10, 2005 appellant, then a 57-year-old housekeeping aid, sustained injury to his hips and back. The Office accepted the claim for lumbar sprain/strain and displaced lumbar intervertebral disc with myelopathy. The Office authorized a posterior lumbar L4-5 discectomy and fusion, which appellant underwent on July 7, 2005. Appellant received appropriate compensation benefits.

In a February 14, 2006 report, Dr. John C. Milani, an attending Board-certified orthopedic surgeon, noted that he had reviewed a functional capacity evaluation performed on appellant. He advised that appellant could return to sedentary work for four hours per day with occasional lifting up to 10 pounds. Dr. Milani noted that appellant would be reevaluated at his next office visit.

On February 16, 2006 the employing establishment offered appellant a modified laundry worker position for four hours per day within the work restrictions set by Dr. Milani. Appellant reported to work on March 6, 2006.

In an October 3, 2006 report, Dr. Milani advised that appellant could work for eight hours per day within restrictions. He completed a work capacity evaluation and provided restrictions of no pushing or pulling over 20 pounds and no lifting over 10 pounds. Dr. Milani indicated that appellant should avoid squatting, kneeling, climbing and twisting.

Appellant worked for five hours a day on October 16, 2006. On December 14, 2006 appellant was advised that his retirement was effective December 15, 2006. The record reflects that he stopped work on December 15, 2006.

In a December 20, 2006 memorandum of telephone call, the Office confirmed with Dr. Milani that appellant was capable of work for eight hours a day since November 13, 2006.²

By letters dated January 8 and February 8, 2007, the Office noted that appellant returned to work as a laundry worker on March 6, 2006. It found that he abandoned work on December 15, 2006 with no apparent valid reason. The Office advised appellant that the duties and physical requirements of the offered position were found to be suitable to his capabilities and remained available. Appellant was advised that he should return to the position or provide an explanation for refusing the position within 30 days. The Office informed appellant that if he failed to return to the offered position and failed to demonstrate that the failure was justified, his compensation would be terminated.

In a February 7, 2007 report, Dr. Milani related that appellant informed him that he was medically retired. He diagnosed possible hardware irritation and L3-4 stenosis.

In a February 7, 2007 e-mail, the employing establishment confirmed that appellant did not work for eight hours a day. In a February 12, 2007 memorandum of telephone call, the

² In a December 22, 2006 e-mail, the Office advised that the employing establishment advised that appellant was released to eight hours per day on November 13, 2006 with permanent restrictions.

Office contacted appellant and his representative. The Office noted that appellant indicated that he was temporarily totally disabled and would provide documentation from his physician.

The Office subsequently received an April 12, 2006 report from Dr. Ronnie Shade, an orthopedic surgeon, who advised that appellant could perform limited duty for four hours per day. In a February 19, 2007 report, Dr. Shade diagnosed lumbar herniated pulposus at L4-5 with sciatica and lumbar spondylolisthesis at L4-5 with instability. He noted that appellant was retired.

By letter dated March 8, 2007, the Office informed appellant that his reasons for refusing the position were not acceptable and allowed 15 days for him to accept the position. Appellant was advised that no further reason for refusal would be considered.

In a February 10, 2007 report, Dr. Shade diagnosed lumbar herniated nucleus pulposus at L4-5, surgically treated and lumbar spondylolisthesis, Grade 1. He opined that appellant had 19 percent impairment to the lower extremity and reached maximum medical improvement on February 10, 2007.

In a February 13, 2007 operative report, Dr. Robert Nisbet, Board-certified in internal medicine, opined that appellant had a successful hardware injection of the bilateral L4 and L5 pedicle screws.

The Office also received a February 27, 2007 report from Dr. Milani, who noted that appellant had recently undergone a hardware injection on February 13, 2007. He reviewed the x-rays and determined that they revealed a good probability of solid fusion. Dr. Milani opined that appellant had probable hardware irritation and should consider the possibility of hardware removal and fusion exploration.

In a memorandum of telephone call dated March 9, 2007, appellant advised the Office that his doctor medically retired him.

In e-mail correspondence dated March 27, 2007, the employing establishment confirmed that the modified laundry position was still available for appellant.

By decision dated March 27, 2007, the Office terminated the appellant's entitlement to wage loss and schedule award compensation benefits, effective that day, finding that appellant had abandoned suitable employment.

In a report dated March 29, 2007, Dr. Shade noted that appellant had complaints of joint stiffness and muscle spasm, with a pain level of 8 out of 10. Appellant had a lumbar herniated pulposus at L4-5 with sciatica and lumbar spondylolisthesis at L4-5 with instability and failed back syndrome. Dr. Shade opined that appellant was permanently disabled and unable to work. In an April 13, 2007 report, he reiterated that appellant was totally disabled and unable to work. The Office received copies of reports previously submitted.

On May 10, 2007 appellant requested reconsideration of the March 27, 2007 decision. He confirmed that he worked in the laundry worker position from March 6 to November 3, 2006. Appellant left the position because he had a deteriorating medical condition and was retired from

working by Dr. Shade. He was approved for disability retirement on December 15, 2006 and took leave from his job because his disability would not let him sit or stand without heavy medication. Appellant alleged that the medication presented a safety issue and was the reason for his leave of absence. He denied that he had abandoned his position.

In a May 14, 2007 report, Dr. Shade diagnosed lumbar herniated pulposus at L4-5 with sciatica and lumbar spondylolisthesis at L4-5 with instability. He opined that appellant was disabled.

In a letter dated June 6, 2007, Melanie Bolden, an injury compensation specialist, advised the Office that on the date of injury, appellant was employed full time as a housekeeping aid working eight hours per day. She noted that appellant accepted a modified job offer and returned to work for four hours a day on March 6, 2006. Ms. Bolden noted that on October 3, 2006 appellant was released to work five hours per day for three weeks, with an increase in one hour per week thereafter to eventually work eight hours a day. Appellant was advised effective October 16, 2006, that he would begin working five hours a day and was expected to work eight hours a day as of November 20, 2006. However, he elected a disability retirement effective December 15, 2006.

By decision dated June 27, 2007, the Office denied modification of its March 27, 2007 decision.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides at section 8106(c)(2) that a partially disabled employee who refuses or neglects to work after suitable work is offered is not entitled to compensation.³ Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits under section 8106 for refusing to accept or neglecting to perform suitable work.⁴ The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to future compensation and, for this reason, will be narrowly construed.⁵ To establish that a claimant has abandoned suitable work, the Office must substantiate that the position offered was consistent with the employee's physical limitations and that the reasons offered for stopping work were unjustified.⁶ The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is a medical question that must be resolved by the medical evidence of record.⁷

³ 5 U.S.C. § 8106(c)(2).

⁴ See *Bryant F. Blackmon*, 56 ECAB 752 (2005); *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

⁵ See *Richard P. Cortes*, 56 ECAB 200 (2004); *H. Adrian Osborne*, 48 ECAB 556 (1997).

⁶ See *Wayne E. Boyd*, 49 ECAB 202 (1997).

⁷ See *John E. Lemker*, 45 ECAB 258 (1993); *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

Section 10.517(a) of the Act's implementing regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured by the employee has the burden of showing that such refusal or failure to work was reasonable or justified.⁸ Pursuant to section 10.516, the employee shall be provided with the opportunity to make such a showing⁹ before a determination is made with respect to termination of entitlement to compensation.⁹ According to Office procedures, unacceptable reasons for abandonment of suitable work include personal dislike of the position or the work hours, lack of potential for promotion, lack of job security and retirement.¹⁰

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a lumbar sprain/strain and displaced lumbar intervertebral disc with myelopathy. The Office authorized a posterior lumbar L4-5 discectomy and fusion, which appellant underwent on July 7, 2005. Appellant returned to modified duty on March 6, 2006. The Office terminated his compensation effective March 27, 2007 on the grounds that he abandoned suitable work on December 15, 2006. The initial question is whether the Office properly determined that the position was suitable. 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 the medical evidence.¹¹

The Office found that the modified-duty laundry worker position was within appellant's physical capabilities. The evidence consists of the February 14, 2006 report, from Dr. Milani, a Board-certified orthopedic surgeon and attending physician, who noted that he had reviewed the functional capacity evaluation and opined that appellant could return to sedentary work for four hours per day with an occasional 10-pound lifting restriction. The record reflects that appellant was offered a modified-duty laundry position in accordance with these restrictions on February 16, 2006. He reported to work on March 6, 2006 for four hours daily which increased to five hours daily on October 16, 2006. On October 3, 2006 Dr. Milani released appellant to perform modified duty for eight hours a day and provided restrictions comprised of no pushing or pulling over 20 pounds and no lifting over 10 pounds. Dr. Milani indicated that appellant should avoid squatting and kneeling and climbing and twisting.

The modified-duty laundry position to which appellant returned conformed to the work restrictions set by his treating physician. The clear weight of the medical evidence, as represented by the reports of Dr. Milani, establishes that appellant was no longer totally disabled for work and had the physical capacity to perform the modified duties as listed in the February 16, 2006 job offer for four hours a day. The record reflects that appellant worked in the modified laundry position from March 6, 2006 and stopped working on December 15, 2006. He informed the Office that he had retired as of that date.

⁸ 20 C.F.R. § 10.517(a); see *Richard P. Cortes*, *supra* note 5; *Ronald M. Jones*, 52 ECAB 190 (2000).

⁹ 20 C.F.R. § 10.516; *Mary E. Woodard*, 57 ECAB ____ (Docket No. 05-1023, issued November 14, 2005).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.10(d) (July 1997).

¹¹ See *Gayle Harris*, 52 ECAB 319, 321 (2001); *Maurissa Mack*, 50 ECAB 498 (1999).

To properly terminate compensation under section 8106, the Office must provide appellant notice of its finding that an offered position is suitable and give him an opportunity to accept or provide reasons for declining the position.¹² The Office properly followed its procedural requirements in this case. By letters dated January 8 and February 8, 2007, the Office advised appellant that the position was suitable and provided him 30 days to explain his reasons for abandoning work. The Office further notified him that the position remained open, that he would be paid for any difference in pay between the offered position and his date-of-injury job, that he could still accept without penalty and that a partially disabled employee who refused suitable work was not entitled to compensation.

On February 12, 2007 the Office advised appellant that the modified position remained awardable. Appellant indicated that he was temporarily totally disabled and would provide documentation from his physician. He subsequently submitted a February 7, 2007 report from Dr. Milani, who noted that appellant stated that he was “medically retired.” In an April 12, 2006 report, Dr. Shade opined that appellant was able to perform modified duty for four hours per day. On February 19, 2007 he advised that appellant was “retired.” These reports do not contain any opinion that appellant was totally disabled or regarding his inability to perform the duties of the modified position after December 15, 2006, the date he retired.¹³ Therefore, he did not submit sufficient medical evidence to establish that his condition would prevent him from performing the sedentary position. The Board notes that Office procedures indicate that retirement is an unacceptable reason for abandonment of suitable work.¹⁴

In a March 8, 2007 letter, the Office informed appellant that his reasons for abandoning the offered position were unacceptable and provided him 15 days to accept the position. Appellant subsequently submitted a February 10, 2007 report from Dr. Shade, who provided an impairment rating and opined that appellant had reached maximum medical improvement, matters not relevant to the issue in this case. In a February 13, 2007 report, Dr. Nisbet, performed a hardware injection. On February 27, 2007 Dr. Milani opined that appellant should consider the possibility of hardware removal and fusion exploration. However, the physicians did not address the relevant issue of whether appellant was totally disabled as of December 15, 2006 when he stopped work.

The weight of the medical evidence establishes that appellant was able to perform the duties of the modified-duty position and he did not offer sufficient justification for abandoning work. The Board finds that the Office met its burden of proof to terminate appellant’s compensation benefits effective March 27, 2007, as he abandoned suitable work.¹⁵

¹² See *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff’d on recon.*, 43 ECAB 818 (1992).

¹³ The Board also notes that, after stopping work, appellant did not claim a recurrence of disability or submit evidence suggesting a recurrence of disability. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(b)(1) (December 1995).

¹⁴ See *supra* note 10.

¹⁵ *Karen L. Yaeger*, 54 ECAB 323 (2003).

Following the termination of his benefits, appellant has not established that the offered position was outside of his physical recommendations. The Board finds that he did not meet his burden to show that his refusal to accept suitable work was justified.¹⁶ After the Office terminated appellant's benefits, he requested reconsideration and alleged that his medical condition had deteriorated and that he was retired from working by Dr. Shade. Appellant denied that he had abandoned his position and noted that his disability required that he use heavy medication, which presented a safety issue. The March 29 and May 14, 2007 reports of Dr. Shade noted that appellant was totally disabled and unable to work. He diagnosed a herniated nucleus pulposus at L4-5 with sciatica and lumbar spondylolisthesis at L4-5 with instability and failed back syndrome. However, Dr. Shade did not provide a rationalized opinion as to why appellant was totally disabled and became unable to work as of December 15, 2006. It is well established that medical reports which are not fortified by rationale are of diminished probative value.¹⁷ Dr. Shade provided no supporting rationale explaining why appellant could no longer work in the modified position. His reports are of limited probative value.

The Board finds that the Office met its burden of proof in terminating appellant's monetary compensation benefits effective March 27, 2007. Appellant did not establish that his abandonment of suitable work was justified.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's monetary compensation effective March 27, 2007, on the grounds that he abandoned suitable work.

¹⁶ Once the Office establishes that the work offered was suitable, the burden of proof shifts to the employee who refuses to work to show that such refusal was reasonable or justified. *Bryant F. Blackmon*, 56 ECAB 752 (2005).

¹⁷ *Cecelia M. Corley*, 56 ECAB 662 (2005).

ORDER

IT IS HEREBY ORDERED THAT the June 27 and March 27, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 10, 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