United States Department of Labor
Employees' Compensation Appeals Board

R.S., Appellant	)	
and	)	**Docket No. 08-1052**
	)	**Issued: October 22, 2008**
U.S. POSTAL SERVICE, SPRING VALLEY ANNEX, Monsey, NY, Employer	)	

Appearances:
Thomas S. Harkins, Esq., 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 February 26, 2008 appellant filed an appeal of decisions of the Office of Workers' Compensation Programs dated June 15, July 11 and December 11, 2007 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 this case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation benefits on July 8, 2007 pursuant to 5 U.S.C. § 8106(a).

FACTUAL HISTORY

On May 2, 2003 appellant, then a 44-year-old letter carrier, sustained an employment-related cervical strain and left rotator cuff tear when he slipped and fell in the employing establishment parking lot while working on his postal vehicle. He stopped work that day. Appellant's attending physician, Dr. Stefan Kurucz, an internist, advised that appellant could not return to work and he was placed on the periodic rolls.

On December 1, 2005 the Office referred appellant to Dr. Marc H. Appel, a Board-certified orthopedic surgeon, for a second opinion evaluation. By report dated December 16, 2005, Dr. Appel provided findings on physical examination and diagnosed a cervical sprain by history which had resolved, chronic lumbosacral sprain and left probable rotator cuff tear. Although, appellant could not return to work as a letter carrier, he could perform limited duties with restrictions that he not lift, push or pull more than 10 pounds with his left upper extremity. Dr. Appel concluded that maximum medical improvement had been reached and that appellant did not require further medical care. In a December 17, 2005 work capacity evaluation, he advised that appellant could work eight hours a day with permanent restrictions of limited reaching and reaching above the shoulder on the left, four hours of twisting, and a 10-pound pushing, pulling and lifting restriction on the left.

On February 10, 2006 the employing establishment offered appellant a limited-duty position based on Dr. Appel's restrictions. Appellant, through his attorney, refused the offered position. He submitted additional reports from Dr. Kurucz, who advised that appellant was totally disabled. The Office determined that a conflict in medical opinion arose between Dr. Kurucz and Dr. Appel regarding appellant's capacity for work. On October 24, 2006 the Office referred him to Dr. Joseph P. Laico, Board-certified in orthopedic surgery, for an impartial evaluation.

By report dated November 14, 2006, Dr. Laico reviewed the record including the history of injury, statement of accepted facts and appellant's complaints. He stated that appellant reported that he was being treated for hypertension, gallbladder disease, diverticulitis, asthma, prostatitis and chronic sinusitis and provided physical findings. Dr. Laico diagnosed cervical strain and sprain resolved, rule-out internal derangement of the left shoulder, and recommended a magnetic resonance imaging (MRI) scan study. He advised that, while appellant continued to have residuals of his employment injury, he was capable of performing the job duties as described in the February 10, 2006 offer. In a work capacity evaluation dated November 20, 2006, Dr. Laico advised that appellant could work eight hours a day, with reaching, reaching above the shoulder, operating a motor vehicle at work and to/from work, and climbing restricted to four hours daily, and pushing, pulling, lifting and kneeling restricted to six hours daily, and a 20-pound weight restriction. A December 19, 2006 left shoulder MRI scan demonstrated a partial tear at both the supraspinatus and infraspinatus tendons without definitive full-thickness tearing or tendon retraction. On December 21, 2006 Dr. Laico reviewed the MRI scan and recommended follow-up with an orthopedic surgeon.

On January 19, 2007 the employing establishment offered appellant a modified-duty position based on Dr. Laico's restrictions, which appellant refused. The employing establishment reoffered the position on March 23, 2007. In a work capacity evaluation dated March 26, 2007, Dr. Laico advised that appellant could not perform his usual position but could work eight hours a day with no lifting, pushing or pulling over 20 pounds with his left upper extremity. Climbing, reaching, reaching above the shoulder, and operating a motor vehicle at work or to/from work were limited to four hours daily, and pushing, pulling, lifting and kneeling were limited to six hours a day. By letter dated March 27, 2007, Dr. Laico advised that appellant could perform the duties of the offered position.

On March 30, 2007 the Office advised appellant that the position offered was suitable. Appellant was notified that, if he failed to report to work at the offered position or failed to demonstrate that the failure was justified, his right to compensation would be terminated pursuant to section 8106 of the Federal Employees' Compensation Act.[1] Appellant was given 30 days to respond. He again refused the offered position. On April 20, 2007 appellant's attorney contended that the offered position was not suitable, based on Dr. Kurucz's opinion. In an April 12, 2007 report, Dr. Kurucz reviewed the March 23, 2007 job offer and opined that appellant was unable to perform the duties "because of the medical situation caused by multiple injuries sustained while working at the [employing establishment] on May 2, 2003." He concluded that the disability was permanent.

By letter dated April 27, 2007, the Office advised appellant that his reasons for refusing the offered position were not acceptable, and he was given an additional 15 days to respond. In a June 15, 2007 decision, the Office terminated appellant's wage-loss compensation, effective June 16, 2007, on the grounds that he declined an offer of suitable work. On July 11, 2007 the Office amended the June 15, 2007 to show an effective date of July 8, 2007.[2]

On November 16, 2007 appellant, through his attorney, requested reconsideration. In an October 15, 2007 report, Dr. Kurucz advised that he had been appellant's physician for over 20 years. Due to appellant's left shoulder injury, his range of motion was severely limited and his injury to the lumbar spine caused impingement on the sciatic nerve which caused paralysis 40 to 60 percent of the time. The cervical spine strain caused pinching of the nerve roots that resulted in a 30 to 40 percent loss of range of motion and arthritis was prevalent throughout the cervical region. Dr. Kurucz noted that appellant had additional medical conditions including severe asthma, allergies, contact dermatitis and allergic rhinitis which made him prone to sinus, lung and skin infections, that he had tested positive for the *Helicobacter pylori* bacteria in his digestive system, which was cancer-causing, had tested positive for gastric and peptic ulcers, irritable bowel syndrome, colitis, diverticulitis and hiatal hernia, was undergoing treatment for chronic bladder and kidney infections, had high blood pressure, was at a high risk of cardiovascular disease, suffered from acute gallbladder disease and gallstones, and had signs of arthritis in his knees, elbows, and fingers. Appellant's attorney argued that the June 15, 2007 decision had no effect because a copy was not mailed to him as appellant's authorized representative, that appellant suffered additional injuries on May 2, 2003 including a lumbosacral condition that should be accepted, and that, as neither Dr. Appel nor Dr. Laico considered appellant's nonaccepted medical problems, Dr. Kurucz's opinion constituted rationalized medical evidence that appellant could not perform the limited-duty position. By decision dated December 11, 2007, the Office denied modification of the July 11, 2007 decision.

[1] 5 U.S.C. §§ 8101-8193.

[2] On July 12, 2007 the Office determined that an overpayment in compensation in the amount of $619.16 had been created and administratively terminated debt collection on October 15, 2007. *See* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.8 (May 2004).

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."[3] 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.[4] 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 was reasonable or justified and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.[5] 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.[6] 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.[7] 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.[8] 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.[9]

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.[10] It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.[11] Section 8123(a) of the Act provides that 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.[12] When the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if

[3] 5 U.S.C. § 8106(c).

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

[5] 20 C.F.R. § 10.517(a).

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

[7] 20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB 681 (2004).

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

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

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

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

[12] 5 U.S.C. § 8123(a); *see Geraldine Foster*, 54 ECAB 435 (2003).

sufficiently well rationalized and based on a proper factual background, must be given special weight.[13]

ANALYSIS

The Board initially notes that, although the Office stated in its December 11, 2007 decision that it was denying appellant's reconsideration request, the Office reviewed his arguments regarding the June and July 2007 Office decisions and Dr. Kurucz's November 14, 2006 report and did not address the factors found in section 10.606(b)(2) of Office regulations.[14] The Board therefore finds the December 11, 2007 decision to be a decision on the merits of the case. The Board also finds that any error in not mailing the June 15, 2007 decision to appellant's attorney is harmless because the procedural deficiency was cured by sending him the July 11, 2007 decision that amended the June 15, 2007 decision.[15]

The Board finds that the Office properly terminated appellant's compensation effective July 8, 2007 because he refused an offer of suitable work. The Office determined that a conflict in the medical evidence was created between the opinions of appellant's treating physician Dr. Kurucz, and Dr. Appel, who provided a second opinion evaluation for the Office, regarding appellant's ability to work. The Office then properly referred appellant to Dr. Laico, Board-certified in orthopedic surgery, for an impartial evaluation.[16] The employing establishment offered appellant a modified-duty position with physical restrictions that followed those provided by Dr. Laico, who reviewed the job offer and found it acceptable. In his November 14, 2006 report, Dr. Laico noted that appellant was being treated for hypertension, gallbladder disease, diverticulitis, asthma, prostatitis and chronic sinusitis and provided physical findings. He diagnosed cervical strain and, following a left shoulder MRI scan study, a partial tear at both the supraspinatus and infraspinatus tendons. In a work capacity evaluation dated March 26, 2007, Dr. Laico advised that appellant could not perform his usual position but could work eight hours a day with no lifting, pushing or pulling over 20 pounds with his left upper extremity. Climbing, reaching, reaching above the shoulder, and operating a motor vehicle at work or to/from work were limited to four hours daily, and pushing, pulling, lifting and kneeling were limited to six hours a day. The employing establishment reoffered the position on March 23, 2007, and by letter dated March 27, 2007, Dr. Laico advised that appellant could perform the duties of the January 19, 2007 offered position.[17]

[13] *Manuel Gill*, 52 ECAB 282 (2001).

[14] This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office. 20 C.F.R. § 10.606(b)(2).

[15] *See generally Ezell Wills*, 50 ECAB 229 (1999).

[16] *Supra* note 12.

[17] The positions offered on January 19 and March 23, 2007 were the same.

While Dr. Kurucz, an attending internist, advised that appellant could not work, and in an October 15, 2007 report advised that appellant's left shoulder range of motion was severely limited, that impingement on the sciatic nerve caused paralysis 40 to 60 percent of the time, and that pinching of cervical nerve roots resulted in a 30 to 40 percent loss of range of motion. He noted additional medical conditions including severe asthma, allergies, contact dermatitis, allergic rhinitis, positive *Helicobacter pylori* bacteria testing, positive gastric and peptic ulcer testing, irritable bowel syndrome, colitis, diverticulitis, a hiatal hernia, chronic bladder and kidney infections, high blood pressure, acute gallbladder disease and gallstones, arthritis of the cervical spine, knees, elbows, and fingers and advised that appellant was at a high risk of cardiovascular disease.

A subsequently submitted report of a physician on one side of a resolved conflict of medical opinion is generally insufficient to overcome the weight of the impartial medical specialist or to create a new conflict of medical opinion,[18] and the Board finds Dr. Kurucz's October 15, 2007 report insufficient to overcome the weight accorded Dr. Laico as an impartial medical specialist. Dr. Laico reviewed appellant's complete medical history, including nonaccepted conditions, and provided a comprehensive, well-rationalized evaluation in which he clearly advised that appellant could perform the duties of the offered position. His opinion is entitled to the special weight accorded an impartial examiner and therefore constitutes the weight of the medical evidence.[19]

In order to properly terminate appellant's compensation under section 8106 of the Act, the Office must provide appellant notice of its finding that an offered position is suitable and give appellant an opportunity to accept or provide reasons for declining the position.[20] The record in this case indicates that the Office properly followed the procedural requirements. By letter dated March 30, 2007, the Office advised appellant that the offered position was suitable. Appellant was notified that, if he failed to report to work or failed to demonstrate that the failure was justified, his right to compensation would be terminated, and was allotted 30 days to either accept or provide reasons for refusing the position. In a letter dated April 27, 2007, the Office advised appellant that the reasons given for not accepting the job offer were unacceptable, and he was given an additional 15 days in which to respond. There is, therefore, no evidence of a procedural defect in this case as the Office provided appellant with proper notice. Appellant was offered a suitable position by the employing establishment and such offer was refused. Thus, under section 8106 of the Act, his compensation was properly terminated effective July 8, 2007 on the grounds that he refused an offer of suitable work.[21]

[18] *Richard O'Brien*, 53 ECAB 234 (2001).

[19] *See Sharyn D. Bannick*, 54 ECAB 537 (2003).

[20] *See Maggie L. Moore*, *supra* note 6.

[21] *Joyce M. Doll*, *supra* note 4.

CONCLUSION

The Board finds that the Office properly terminated appellant's wage-loss compensation pursuant to 5 U.S.C. § 8106(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 11 and July 11, 2007 be affirmed.

Issued: October 22, 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