United States Department of Labor
Employees' Compensation Appeals Board

M.S., Appellant	)	
and	)	**Docket No. 08-1715**
	)	**Issued: February 11, 2009**
DEPARTMENT OF THE ARMY, MATERIAL COMMAND, Texarkana, TX, Employer	)	

Appearances:
Randolph Baltz, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 2, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' June 27, 2007 merit decision terminating his compensation, an August 28, 2007 nonmerit decision denying his hearing request, and the May 7 and September 18, 2008 nonmerit decisions denying his reconsideration requests. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation effective July 7, 2007 on the grounds that he refused an offer of suitable work; (2) whether the Office properly denied his hearing request; and (3) whether the Office properly denied his request for further review of the merits of his claim.

FACTUAL HISTORY

The Office accepted that on September 29, 2005 appellant, then a 55-year-old tractor operator, sustained lumbar and thoracic sprains/strains and degeneration of lumbar discs while

trying to pull the buggy frames of a Humvee out of a ditch. Appellant stopped work for various periods and received appropriate compensation from the Office. The findings of November 2, 2005 magnetic resonance imaging scan testing showed that appellant had multiple levels of cervical, thoracic and lumbar disc degeneration.

In a May 10, 2006 report, Dr. Rodney Chandler, an attending Board-certified general practitioner, stated that appellant was unable to perform any work due to residuals of his accepted employment injuries. The record contains numerous examination reports in which Dr. Chandler indicated that appellant exhibited neck, back and extremity pain and had limitation of motion. Dr. Chandler continued to produce reports throughout 2006 indicating that appellant's condition had not changed.

On November 8, 2006 Dr. John Sandifer, a Board-certified orthopedic surgeon, who served as an Office referral physician, stated that on examination appellant had no motor or sensory loss in his extremities but did have some limitation of bending motion. He diagnosed cervical strain superimposed on cervical degenerative disc disease, left shoulder strain with mild tendinitis left and chronic lumbar strain with degenerative disc disease lumbar spine. Dr. Sandifer indicated that there were no "truly objective findings" on physical examination and indicated that appellant could probably perform his regular work as a tractor operator.[1] He noted that appellant could lift, push or pull up to 20 pounds for four hours per day, sit for six hours, stand or walk for five hours and engage in such activities as twisting, stooping and bending for two or three hours.

On January 29, 2007 the employing establishment offered appellant a full-time position as a modified clerk. The position was clerical in nature and required a "light to medium" level of work. It involved such duties as reviewing, sorting and distributing mail to appropriate persons, filing documents, ordering office supplies, operating fax machines and copy machines, completing work orders, typing documents and envelope labels, receiving and responding to emails, reviewing monthly reports for accuracy, and screening and escorting visitors. The physical requirements of the position indicated that appellant would have to reach above his shoulders for up to 30 minutes per day, walk for 2 hours and stand for 2 hours. The position would require him to use his fingers. On February 5, 2007 appellant declined the offered job indicating that he was not physically able to perform it.

The Office determined that there was a conflict in the medical opinion between Dr. Chandler and Dr. Sandifer regarding appellant's capacity for work. In order to resolve the conflict, the Office referred appellant, pursuant to section 8123(a) of the Act, to Dr. Robert E. Holladay, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.

On February 15, 2007 Dr. Holladay indicated that on examination appellant reported pain in his cervical and lumbar spines but that no trigger points or spasms were found. Appellant had normal findings upon sensory examination of his extremities and motion of his neck, back and extremities was normal. There was no weakness in appellant's extremities and, despite his complaints of left shoulder pain, he could abduct the shoulders against resistance, flex and

[1] The tractor operator position requires lifting up to 50 pounds.

extend the elbows, extend and flex the wrists and grip with both hands. Dr. Holladay concluded that appellant could work eight hours per day with restrictions. He stated that appellant could sit, stand or walk for eight hours per day, twist for one hour per day, and push or pull up to 10 pounds for eight hours per day. Dr. Holladay noted that appellant could not bend, stoop, squat, kneel or climb.

In an April 26, 2007 letter, the Office advised appellant of its determination that the modified clerk position offered by the employing establishment was suitable. It informed appellant that his compensation would be terminated if he did not accept the position or provide good cause for not doing so within 30 days of the date of the letter. Appellant continued to assert that he was not physically capable of performing the offered position and submitted progress reports of Dr. Chandler which indicated that he remained symptomatic.

In a June 1, 2007 letter, the Office advised appellant that his reasons for not accepting the position offered by the employing establishment were unjustified. It informed appellant that his compensation would be terminated if he did not accept the position within 15 days of the date of the letter. Appellant did not accept the position within the allotted time.

In a June 27, 2007 decision, the Office terminated appellant's wage-loss compensation effective July 7, 2007 on the grounds that he refused an offer of suitable work. It indicated that the weight of the medical evidence regarding appellant's ability to work rested with the well-rationalized opinion of Dr. Holladay.

In a letter postmarked August 3, 2007, appellant requested a hearing before an Office hearing representative. In an August 28, 2007 decision, the Office hearing representative denied appellant's request on the grounds that it was untimely. He exercised his discretion and denied appellant's request on the grounds that the claim could be equally well addressed by submitting additional evidence and requesting reconsideration.

In a September 7, 2007 letter, appellant requested reconsideration of his claim. He submitted a number of reports from 2007 in which Dr. Chandler indicated that he remained symptomatic. In a September 18, 2007 decision, the Office denied appellant's request for further review of the merits of his claim. In a March 12, 2008 letter, appellant again requested reconsideration of his claim. He submitted reports from 2007 in which Dr. Chandler continued to indicate that he remained symptomatic. In a May 7, 2008 decision, the Office denied appellant's request for further review of the merits of his claim.

LEGAL PRECEDENT -- ISSUE 1

Section 8106(c)(2) of the Federal Employees' Compensation 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."[2] However, to justify such termination, the Office must show that the work offered was suitable.[3] An employee who refuses or neglects to work

[2] 5 U.S.C. § 8106(c)(2).

[3] *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[4]

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."[5] 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.[6] 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.[7]

ANALYSIS -- ISSUE 1

The Office accepted that on September 29, 2005 appellant sustained lumbar and thoracic sprains/strains and degeneration of lumbar discs while trying to pull the buggy frames of a Humvee out of a ditch. On January 29, 2007 the employing establishment offered appellant a full-time position as a modified clerk. The position involved such duties as reviewing, sorting and distributing mail to appropriate persons, filing documents, ordering office supplies, operating fax machines and copy machines, completing work orders, typing documents and envelope labels, receiving and responding to emails, reviewing monthly reports for accuracy and screening and escorting visitors. A document which described the physical requirements of the position indicated that appellant would have to reach above his shoulders for up to 30 minutes per day and would have to use his fingers. Appellant refused the position and the Office terminated his compensation for failure to accept suitable work.

The Office determined that there was a conflict in the medical opinion between Dr. Chandler, an attending Board-certified general practitioner, and Dr. Sandifer, a Board-certified orthopedic surgeon acting as an Office referral physician, regarding appellant's ability to work.[8] In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Holladay, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.

The Board notes that the well-rationalized February 15, 2007 opinion of Dr. Holladay shows that appellant could perform the modified clerk position offered by the employing

[4] 20 C.F.R. § 10.517; *see Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

[5] 5 U.S.C. § 8123(a).

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

[7] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

[8] In a May 10, 2006 report, Dr. Chandler stated that appellant was unable to perform any work due to residuals of his accepted employment injuries. In contrast Dr. Sandifer indicated in a November 8, 2006 report that he could lift, push or pull up to 20 pounds for four hours per day, sit for six hours, stand or walk for five hours and engage in such activities as twisting, stooping and bending for two or three hours.

establishment and this opinion represents the weight of the medical evidence with respect to his ability to work.[9] Dr. Holladay explained that appellant had extremely limited objective findings on examination. He concluded that appellant could work eight hours per day with restrictions and the Board finds that these restrictions would not prevent appellant from performing the offered position. The modified clerk position required limited exertion of the upper extremities while performing such activities such as typing or filing documents. Dr. Holladay noted that appellant was capable of pushing or pulling up to 10 pounds for eight hours per day. Moreover, he found that there was no weakness in appellant's extremities and, despite his complaints of left shoulder pain, he could abduct the shoulders against resistance, flex and extend the elbows, extend and flex the wrists and grip with both hands. Dr. Holladay indicated that on examination appellant reported pain in his cervical and lumbar spines but that no trigger points or spasms were found. Appellant had normal findings upon sensory examination of his extremities and motion of his neck, back and extremities was normal.[10] Dr. Holladay stated that appellant could sit, stand or walk for eight hours per day and the offered position requires only two hours of standing and two hours of walking per day. He noted that appellant could not bend, stoop, squat, kneel or climb, but there is no indication that the offered position requires such activities.

The Board finds that the Office established that the modified clerk position offered by the employing establishment is suitable. As noted, once the Office has established that a particular position is suitable, 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. Appellant contends that he is physically unable to perform the offered position and submitted reports from 2007 in which Dr. Chandler indicated that he remained symptomatic. However, these reports contained no opinion on appellant's ability to work. The Board has carefully reviewed the evidence and argument submitted by appellant in support of his refusal of the modified clerk position and notes that it is not sufficient to justify his refusal of the position.

For these reasons, the Office properly terminated appellant's compensation effective July 7, 2007 on the grounds that he refused an offer of suitable work.[11]

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[12] As section 8124(b)(1) is unequivocal in setting forth the time

[9] *See supra* note 7 and accompanying text.

[10] While Dr. Holladay did not specifically indicate that appellant could reach above his shoulders for 30 minutes per day, there is nothing in his report which shows that he could not perform such a limited activity.

[11] The Board notes that the Office complied with its procedural requirements prior to terminating appellant's compensation, including providing appellant with an opportunity to accept the modified clerk position after informing him that his reasons for initially refusing the position were not valid; *see generally Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).

[12] 5 U.S.C. § 8124(b)(1).

limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.[13] The date of filing is fixed by postmark or other carrier's date marking.[14]

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[15] Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing,[16] when the request is made after the 30-day period for requesting a hearing,[17] and when the request is for a second hearing on the same issue.[18]

ANALYSIS -- ISSUE 2

Appellant's hearing request was made more than 30 days after the date of issuance of the Office's prior decision dated June 27, 2007 and, thus, he was not entitled to a hearing as a matter of right. He requested a hearing before an Office representative in a letter dated and postmarked August 3, 2007. The Office properly found appellant was not entitled to a hearing as a matter of right because his hearing request was not made within 30 days of the June 27, 2007 decision.

The Office has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right. In its August 28, 2007 decision, it properly exercised its discretion when it denied appellant's hearing request on the grounds that his claim could be equally well addressed by submitting additional evidence and requesting reconsideration. The Board has held that as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[19] In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion.

[13] *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

[14] *See* 20 C.F.R. § 10.616(a).

[15] *Henry Moreno*, 39 ECAB 475, 482 (1988).

[16] *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

[17] *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

[18] *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

[19] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

LEGAL PRECEDENT -- ISSUE 3

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[20] the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[21] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[22] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[23] The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.[24]

ANALYSIS -- ISSUE 3

In support of his September 2007 and March 2008 reconsideration requests, appellant maintained that he was physically unable to perform the offered position. He submitted reports from 2007 in which Dr. Chandler indicated that he remained symptomatic. However, appellant had already made this argument and had previously submitted similar reports from Dr. Chandler which were considered by the Office. The Board has held that resubmitting similar arguments and evidence would not require reopening a claim.[25] Appellant has not established that the Office improperly denied his request for further review of the merits of its June 27, 2007 decision under section 8128(a) of the Act, because the evidence and argument he submitted did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or constitute relevant and pertinent new evidence not previously considered by the Office.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation effective July 7, 2007 on the grounds that he refused an offer of suitable work. The Board further finds that the Office properly denied his hearing request and his requests for further review of the merits of his claim.

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[20] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[21] 20 C.F.R. § 10.606(b)(2).

[22] *Id.* at § 10.607(a).

[23] *Id.* at § 10.608(b).

[24] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

[25] *See supra* note 25 and accompanying text.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' May 7, 2008 and September 18, August 28 and June 27, 2007 decisions are affirmed.

Issued: February 11, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board