United States Department of Labor
Employees' Compensation Appeals Board

E.H., Appellant	)	
and	)	**Docket No. 08-1862**
	)	**Issued: July 8, 2009**
DEPARTMENT OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION, Knoxville, TN, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 23, 2008 appellant's representative filed a timely appeal from the Office of Workers' Compensation Programs' hearing representative decision dated May 22, 2008, which affirmed the Office's November 15, 2007 decision, terminating his 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 effective November 24, 2007 on the grounds that he refused an offer of suitable work.

FACTUAL HISTORY

On June 14, 2001 appellant, then a 54-year-old mine safety and health inspector, filed a traumatic injury claim alleging that on February 13, 2001 he had back pain while participating in

first aid training. He did not initially stop work.[1] The Office accepted the claim for herniated lumbar disc and radiculopathy dorsal/lumbosacral and laminectomy, discectomy and decompression. It authorized surgery on August 2, 2001. Appellant returned to part-time limited duty on August 9, 2005 and full-time limited duty on August 11, 2005. He stopped work on April 6, 2006. The Office paid appellant appropriate compensation benefits.

In a report dated July 24, 2006, Dr. William Turney Williams, Board-certified in anesthesiology and pain medicine, diagnosed, postlaminectomy syndrome following multilevel lumbar decompression, chronic left lower extremity L5/S1 radiculopathy, left groin pain likely referable to lower lumbar segment, depression and chronic pain syndrome. He opined that appellant was unable to work. Dr. Williams indicated that appellant's "general well being was hurt by his return to work on an eight[-]hour basis in the manner previously pursued." He advised that appellant would be prone to an exacerbation of baseline discomfort at any time that he would be required to remain in any position for a prolonged period of time. Dr. Williams recommended implantation of a spinal cord stimulator. His physician assistant continued submitting reports noting appellant's status.

On January 23, 2007 the Office referred appellant to Dr. Richard T. Sheridan, a Board-certified orthopedic surgeon, for a second opinion. In a February 28, 2007 report, Dr. Sheridan noted appellant's history of injury and treatment. He examined appellant and indicated that there were no objective findings with the exception of scars in the lower back. Dr. Sheridan recommended that appellant could return to work without restrictions. He also advised that no further medical treatment was warranted.

On May 29, 2007 the Office referred appellant along with a statement of accepted facts and the medical record to Dr. Melvin Heiman, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve the conflict in opinion between Drs. Williams and Sheridan regarding the resolution of appellant's accepted condition and work restrictions.

In a report dated June 29, 2007, Dr. Heiman noted appellant's history of treatment and examined him. He advised that appellant's current symptoms included back pain, which was greater than leg pain, as well as a bothersome left groin and left leg. Dr. Heiman indicated that appellant had "some pain at all times, worsening with some activities." He advised that appellant could sit for 30 minutes without having to get up to move around, walk for greater than 20 minutes and stand for 20 minutes without having to move around and change his position. Dr. Heiman explained that appellant could drive for about an hour if he pushed himself. He noted that appellant stood without abnormal curvature and had two scars in the lower lumbar area and advised that his back mobility was about 50 percent of normal and his side bending was approximately 25 percent of normal. Dr. Heiman indicated that appellant had forward flexion and extension, which was normal with mild discomfort. He indicated that there was no tenderness, negative straight leg raising, no measurable asymmetrical atrophy, normal strength and sensation, full pulses without edema and normal rotation of the hips without pain. Dr. Heiman indicated that appellant was able to work with restrictions. He referred to a March 16, 2005 functional capacity evaluation which revealed that appellant demonstrated the

[1] The record reflects that appellant's preexisting conditions include high blood pressure and cholesterol, nicotine dependence, hernia repair, gastric reflux, 1999 cholecystectomy, nonbleeding ulcers and irregular heartbeat.

ability to perform duties at the light physical demand level and noted that the restrictions were "well stated in the functional capacity evaluation."[2]

In a memorandum dated August 29, 2007, Donna Corbin, an employing establishment supervisor, informed the Office that the employing establishment made every effort to accommodate appellant's return to work in the area of Jonesville, Virginia, where he lived or Knoxville, Tennessee, his duty station when he was injured. She indicated that there were no permanent jobs to accommodate appellant's restrictions in that area. Ms. Corbin stated that a search was made outside the area and the employing establishment was able to offer appellant a job as an information receptionist in Mount Hope, WV, which was in accordance with his restrictions.

On September 4, 2007 the employing establishment offered appellant a permanent modified position as an information receptionist in Mount Hope, WV. The duties included sitting at a switchboard and answering calls, greeting visitors and performing clerical duties. The physical demands were described as sedentary. The employing establishment indicated that it would coordinate with appellant regarding relocation expenses once it received his written acceptance of the position.

By letter dated September 20, 2007, the Office advised appellant that the information receptionist position had been found to be suitable to his capabilities and was currently available. It indicated that the impartial medical examiner, Dr. Heiman, examined appellant on June 29, 2007 and provided work restrictions that were consistent with the offered position. Appellant was advised that he should accept the position or provide an explanation for refusing the position within 30 days. The Office informed appellant that, if he failed to accept the offered position and failed to demonstrate that the failure was justified, his compensation would be terminated.

On September 24, 2007 the Office received a September 12, 2007 response in which appellant declined the offer. Appellant indicated that he did not think that he could satisfactorily perform the job duties due to the prescribed medication as well as physical symptoms of nausea, sweating and lack of energy. He also indicated that "relocating would be more than I can cope with, mentally or physically."

By letter dated October 24, 2007, the Office informed appellant that his reasons for refusing the position were not acceptable and allowed an additional 15 days for him to accept the position. Appellant was advised that no further reason for refusal would be considered.

The Office then received an October 18, 2007 letter from appellant noting his disagreement with some of the history and findings related in Dr. Heiman's report. Appellant also provided an October 27, 2007 response in which he indicated that he was "unable to concentrate enough to perform the job duties described" because of his prescribed medications. He indicated that he was not alert and that, if he did not take the medication, then the pain was

[2] The March 16, 2005 functional capacity evaluation indicated that appellant could perform light work with constant lifting limited to five pounds. He could perform occasional lifting to 20 pounds, reaching, sitting, standing, walking, kneeling, squatting and stair climbing. Appellant was restricted from repetitive bending or squatting.

"too distracting." Appellant also reiterated that "relocating would be more than I can cope with, mentally or physically."

The employing establishment advised the Office on November 14, 2007 that appellant had not accepted the position or made arrangements to report for duty.

By decision dated November 15, 2007, the Office terminated appellant's entitlement to monetary compensation benefits, effective November 24, 2007, on the basis that he had refused suitable work. It determined that the report of Dr. Heiman, the impartial medical examiner, represented the weight of the evidence.

By letter dated December 5, 2007, Robert Harman, the district manager of the employing establishment in WV, advised appellant that the offer for an information receptionist position remained open. He indicated that appellant must report to work no later than December 14, 2007.

Appellant's representative requested a telephone hearing that was held March 10, 2008. During the hearing, appellant indicated that the job offer made to him was 300 miles from where he currently lived. He also alleged that there was an employing establishment office only 35 miles from his residence. Appellant also alleged that he was receiving medication to manage the pain related to his employment injury. He alleged that if he did not take the medication, then he "can't do anything." Appellant also alleged that he was not informed about how the relocation would occur, how much he could spend for moving, whether his house would be paid for or any other details related to the move. After the hearing, he submitted a February 11, 2008 report from Dr. Williams who noted appellant's complaint of low back and bilateral leg pain. He noted that appellant ambulated with an unencumbered gate. Dr. Williams diagnosed degenerative disc disease, left leg and groin radicular pain, depression and chronic pain syndrome with narcotic dependency. Appellant also submitted nurse reports regarding his status.

In a March 31, 2008 letter, Michael Davis, an employing establishment district manager, commented that the job offer for the position in Mount Hope, WV, was made only after every effort was made to accommodate appellant at or near the vicinity of his duty station. He alleged that a search was made for a position near appellant's duty station at the time of the injury and at the time of the job offer. However, Mr. Davis explained that no permanent jobs to accommodate his restrictions were available within that area. He noted that, after determining that no work was available in that area, the employing establishment searched for jobs outside the area and was able to offer appellant an information receptionist position in Mount Hope, WV. Regarding relocation expenses, Mr. Davis noted that the job offer indicated that "relocation expenses would be coordinated once we have received your written acknowledgment accepting the above-mentioned position." He asserted that the employing establishment fulfilled its duties in trying to accommodate appellant in every way possible.

By decision dated May 22, 2008, the Office hearing representative affirmed the Office's November 15, 2007 decision.

LEGAL PRECEDENT

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits.[3] This includes cases in which the Office terminates compensation under section 8106(c)(2) of the Federal Employees' Compensation Act for refusal to accept suitable work.

Section 8106(c)(2)[4] of the Act provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to compensation. Section 10.517(a)[5] of the Office's regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured for him or her has the burden to show that this refusal or failure to work was reasonable or justified. After providing the two notices described in section 10.516,[6] the Office will terminate the employee's entitlement to further compensation under 5 U.S.C. §§ 8105, 8106 and 8107, as provided by 5 U.S.C. § 8106(c)(2). However, the employee remains entitled to medical benefits as provided by 5 U.S.C. § 8103 if justified. To justify termination, the Office must show that the work offered was suitable[7] and must inform appellant of the consequences of refusal to accept such employment.[8] According to Office procedures, certain explanations for refusing an offer of suitable work are considered acceptable.[9] Unacceptable reasons include appellant's preference for the area in which he resides; personal dislike of the position offered or the work hours scheduled; lack of promotion potential or job security.[10]

ANALYSIS

In this case, the Office properly found that Dr. Williams, appellant's physician, disagreed with an Office referral physician, Dr. Sheridan, as to whether appellant was totally disabled due to his accepted condition. It properly found a conflict in medical evidence which required a referral to an impartial medical specialist for resolution.

The Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is a 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."

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[3] *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

[4] 5 U.S.C. § 8106(c)(2).

[5] 20 C.F.R. § 10.517(a).

[6] *Id*. at § 10.516.

[7] *See Carl W. Putzier*, 37 ECAB 691 (1986); *Herbert R. Oldham*, 35 ECAB 339 (1983).

[8] *See Maggie L. Moore*, 42 ECAB 484, 488 (1991), *reaff'd on recon*., 43 ECAB 818, 824 (1992). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(d)(1) (July 1997).

[9] *Id*. at Chapter 2.814.5(a)(1)-(5) (July 1997).

[10] *Arthur C. Reck*, 47 ECAB 339 (1996); *id*. at Chapter 2.814.5(c) (July 1997).

The Office referred appellant to Dr. Heiman for an impartial medical evaluation to resolve the conflict in opinion. Dr. Heiman performed a thorough evaluation on appellant and reviewed the extensive medical record. He reported examination findings and opined that appellant could work eight hours a day with restrictions. Dr. Heiman noted that appellant could sit for 30 minutes without having to get up to move around; walk for greater than 20 minutes and stand for 20 minutes without having to move around and change his position; and that he could drive for about an hour if he pushed himself. He referred to a March 16, 2005 functional capacity evaluation and noted that appellant had demonstrated the ability to perform duties at the light physical demand level. When a case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical opinion, the opinion of such specialist, if sufficiently well rationalized and based on a proper background, must be given special weight.[11] Dr. Heiman's opinion represents the weight of the medical evidence on the issue of appellant's ability to work and establishes that he was capable of working eight hours per day in a sedentary position.

Subsequent to the evaluation by Dr. Heiman, the employing establishment, in an August 29, 2007 memorandum from Ms. Corbin, an employing establishment supervisor, informed the Office that despite making reasonable efforts to accommodate appellant's return to work in the area of his duty station, Knoxville, Tennessee and the area of his residence, Jonesville, Virginia, there were no permanent jobs in those areas that would accommodate his restrictions. On September 4, 2007 the employing establishment offered appellant a permanent modified position, which was in accordance with his restrictions, as an information receptionist in Mount Hope, WV. The employing establishment noted that the position was sedentary in nature. The employing establishment indicated that relocation expenses would be coordinated once appellant accepted the position in writing. The Office reviewed the position and found it to be suitable for appellant and the Board notes that the position was consistent with the work restrictions given by Dr. Heiman.

To properly terminate compensation under section 8106(c), 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] It properly followed its procedural requirements in this case. By letter dated September 20, 2007, the Office advised appellant that the position was suitable and provided him 30 days to accept the position or provide reasons for his refusal. It 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.

Appellant refused the offer indicating that he did not think that he could satisfactorily perform the job duties due to the prescribed medication as well as physical symptoms of nausea, sweating and lack of energy. The Office must consider preexisting and subsequently acquired conditions in determining the suitability of an offered position.[13] In this case, however, appellant

[11] *Kathryn Haggerty*, 45 ECAB 383, 389 (1994); *Jane B. Roanhaus*, 42 ECAB 288 (1990).

[12] *See Maggie L. Moore*, *supra* note 8.

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

did not submit any medical evidence to establish that his medication or physical symptoms would prevent him from performing the sedentary position. He also indicated that "relocating would be more than I can cope with, mentally or physically." With regard to relocation, Office regulations provide that the employer, if possible, should offer suitable reemployment in the location where the employee currently resides. If this is not practical, the employer may offer suitable reemployment at the employee's former duty station or other location.[14] The record reflects that the employing establishment attempted to offer appellant a permanent position in the area of his residence and his duty station; however, it advised the Office that it was unsuccessful in finding a permanent position for appellant in accordance with his restrictions. The employing establishment expanded its search and found a position in accordance with appellant's medical restrictions as an information receptionist in Mount Hope, WV. Appellant's argument that relocating would be more than he could cope with, would fall into the category of preference for the area in which he resides. The Board has found that this would not be an acceptable reason for refusing the position.[15]

By letter dated October 24, 2007, the Office properly informed appellant that his reasons for refusing the offered position were unacceptable and provided him 15 days to accept the position. On October 18, 2007 appellant noted his disagreement with certain aspects of Dr. Heiman's report but he did not submit any new medical evidence supporting that he could not perform the duties of the offered position. In an October 27, 2007 response, appellant advised the Office that he was "unable to concentrate enough to perform the job duties described," because of his prescribed medications. He indicated that he was not alert and that if he did not take the medication, then the pain was "too distracting." As noted, the Office must consider preexisting and subsequently acquired conditions in determining the suitability of an offered position. Appellant did not submit any medical evidence to establish that his medication or physical symptoms would prevent him from performing the sedentary position. He also repeated that "relocating would be more than I can cope with, mentally or physically." This is not an acceptable reason for refusing suitable work.[16] As appellant refused suitable work, the Office properly terminated his wage-loss compensation. At the time of the termination, the weight of the medical evidence established that he could perform the duties of the offered position.

Although appellant submitted a February 11, 2008 report from Dr. Williams after his wage-loss compensation was terminated, this report did not specifically address his work

[14] 20 C.F.R. § 10.508; *Sharon L. Dean*, 56 ECAB 175 (2004).

[15] *See supra* note 10.

[16] *See id*.

restrictions or the offered job.[17] He did not submit any medical evidence subsequent to Dr. Heiman's report regarding specific work restrictions or his ability to perform the offered position.[18]

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.[19] The Board finds that the Office properly terminated appellant's monetary compensation due to his refusal of suitable work. Appellant did not, thereafter, establish that his refusal of suitable work was justified.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation effective November 24, 2007 on the grounds that he refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the May 22, 2008 decision of the Office of Workers' Compensation Programs' hearing representative is affirmed.

Issued: July 8, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[17] Furthermore, the Board has held that reports from a physician who was on one side of a medical conflict that an impartial specialist resolved, are generally insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict. *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008).

[18] The record contains reports from nurses and physicians' assistants. However, nurses and physicians' assistants are not "physicians" as defined under the Act and their opinions are of no probative value. *Roy L. Humphrey*, 57 ECAB 238 (2005). *See* 5 U.S.C. § 8101(2).

[19] 5 U.S.C. § 8106(c)(2).