United States Department of Labor
Employees' Compensation Appeals Board

J.K., Appellant	)	
and	)	**Docket No. 08-690**
	)	**Issued: March 16, 2009**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Sheridan, WY, Employer	)	

Appearances:
Timothy Quinn, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 31, 2007 appellant, through his representative, filed a timely appeal from the January 25, 2007 merit decision of the Office of Workers' Compensation Programs, which terminated his compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case. The Board also has jurisdiction to review the Office hearing representative's October 4, 2007 decision affirming the termination.

ISSUE

The issue is whether the Office properly terminated appellant's compensation under 5 U.S.C. § 8106(c)(2) on the grounds that he refused an offer of suitable work.

FACTUAL HISTORY

On June 19, 1974 appellant, then a 36-year-old nursing assistant, filed a claim for compensation alleging that his back and leg pain was a result of lifting patients in the performance of duty. The Office accepted his claim for mid-back strain, bulging lumbosacral disc and degenerative arthritis at the L5-S2 level. It authorized a March 22, 1977 disc removal

and fusion at the L5-S1 level. Appellant received a schedule award for a six percent permanent impairment of each lower extremity. He received compensation for temporary total disability on the periodic rolls.

On April 13, 1998 Dr. Christopher T. Smith, the attending orthopedic surgeon, reported that he had regularly examined appellant since 1974. He noted that in recent years appellant was presenting more frequently with low back pain. Dr. Smith described appellant's complaints, medications and his findings on physical examination. X-rays from 1994 revealed marked progression of disc space narrowing with peripheral osteophyte formation and degenerative changes throughout the lumbar spine. There were also several levels in the lower dorsal spine bridged by osteophytes. Dr. Smith diagnosed lumbar spondylosis, spinal stenosis and status postoperative lumbar discectomy and fusion. He concluded that appellant would never work again:

> "In view of [appellant's] symptoms, physical findings and radiographic findings I do not feel that he will ever be able to return to gainful employment. It is my opinion that the work injury which induced the herniated disc which subsequently necessitated disc excision and arthrodesis has resulted in a cascade affect of ever worsening low back symptoms as described above. An arthrodesis at one level will transfer the stresses to uninvolved areas and subsequently cause strain in these regions."

On July 9, 2001 Dr. Smith reported that appellant's condition had worsened. He stated that a magnetic resonance imaging (MRI) scan showed severe lumbar spondylosis with marked disc space degeneration at the L2-3 level and disc herniation at the L1-2, L2-3 and L3-4 levels. There were old postsurgical changes of the L4-5 level with stenotic changes as well. Dr. Smith stated: "[Appellant's] pain has been intractable and he has been using Tylox on a daily basis to control the pain." He also stated that appellant had been on a variety of anti-inflammatory medications to no avail and that a rheumatologist had recently concluded there was nothing further to offer surgically. Dr. Smith concluded: "[Appellant's] symptoms and physical findings and radiographic findings are continuing to deteriorate over the recent years. He will never be able to return to gainful employment."

On December 27, 2004 Dr. Smith again reported that appellant would never be able to return to gainful employment. He noted that appellant would be 67 years old in January 2005. Appellant had been disabled since 1998 with severe lumbar spondylosis and degenerative disc disease, with degenerative changes through his dorsal and cervical spine. He also underwent bilateral knee replacements. Appellant still had symptoms of lumbar spinal stenosis, still took anti-inflammatories and narcotic analgesics on a regular basis, was unable to sit, stand or walk for prolonged periods of time and had been seen by a variety of practitioners who could offer no further surgical treatment.

Dr. Dean C. Sukin, an orthopedic surgeon, offered a second opinion on May 17, 2006. He related the history of appellant's present illness and reviewed the medical record. Dr. Sukin described appellant's complaints and his findings on examination. He assessed appellant with severe global pain and multiple medical conditions causing disability. Dr. Sukin stated that appellant, on occasion, may be able to do bursts of activity that include bending, twisting and

lifting; however, it was also his opinion that, if appellant did that on a regular basis, it could cause him severe exacerbation of his underlying condition, not only his low back but his additional comorbidities. He advised that appellant had objective evidence of active and disabling residuals of the accepted employment injury and that appellant's subjective complaints were commensurate with the objective findings. Asked whether appellant could perform the duties of his date-of-injury job, Dr. Sukin replied:

> "No. In my opinion this patient could not do the lifting, twisting and daily activities that are required to take care of patients as a nursing aide or assistant. It is my opinion that this patient may be able to do a light to sedentary job up to a total of two hours per day. However, even sitting for an extended period of time would be extremely difficult for this individual as a result of [appellant's] lumbar condition. He would need to be able to take frequent breaks where he alternates sitting and standing, not do any significant lifting, twisting, kneeling or squatting."

Dr. Sukin considered appellant's prognosis to be guarded. He stated there were no further treatment options. Dr. Sukin noted that appellant had an additional problem -- chronic lymphedema -- that currently needed to be evaluated by the primary care physician on an urgent basis. Appellant was falling and tripping frequently and had a more increased shortness of breath than was otherwise normal.

The employer offered appellant a job as a health aide/sitter, working two hours a day "increasing as allowed by attending physician."[1] Physical demands were described as sedentary, primarily sitting. They included rare to intermittent walking/standing and no lifting, with the exception of very light items. The employee would be allowed to change positions as needed for comfort.

On June 27, 2006 Dr. Smith reported that appellant had to give up some of his walking activities because of symptoms suggestive of neurogenic claudication: "If he stands for a period of time or walks a distance he gets a heavy, achy, weak feeling into both lower extremities." After describing his findings on physical examination, Dr. Smith addressed appellant's capacity to work:

> "[Appellant] recently underwent an independent medical exam and it was the examiner's feeling that [he] might be able to work at a sedentary job for up to two hours a day. He has constant pain and is undergoing a pain treatment regimen and he had abundantly documented orthopedic problems precluding gainful employment. As I have stated several times in the past, I do not feel that

[1] Duties included: "Through conversation, games reading, watching TV together, etc., engages patient as possible; distracting them from harmful activities such as pulling out IV's or tubes, wandering away from unit or attempting to get out of bed or chair without help when patient is a high fall risk. Delivers ice water, facial tissues and other patient comfort items to patients. Inventories patient's personal belonging. Assist nursing staff with feeding of patients and performs other similar duties of a simple nature associated with service to the patient and the patients' immediate environment."

[appellant] is capable of any gainful employment on a regular basis given his musculoskeletal problems."

On July 7, 2006 the Office informed appellant that the offered position was found to be suitable to his work capabilities and was currently available. It gave him 30 days to accept the offer or provide an explanation for refusing it. The Office notified appellant of the penalty under 5 U.S.C. § 8106(c)(2) for refusing an offer of suitable work.

Appellant declined the offer. His attorney noted that he took prescription narcotic pain medication for his injury every four hours, which made him drowsy and impaired his judgment. Counsel also noted that appellant had numerous physical limitations and that a health aide would need more range of movement. He argued that constant back pain would distract appellant and take away his focus from work. Counsel argued that appellant was diagnosed with bipolar disorder, so it did not seem appropriate for him to be around patients. Finally, he stated that it would be against doctor's order for appellant to take the job as a health aide. Counsel stated that appellant's doctor was in the best position to know whether the job was suitable.

The Office provided Dr. Smith with a copy of Dr. Sukin's report and a copy of the job offer and asked for his opinion on whether appellant could perform the duties two hours a day. On September 1, 2006 Dr. Smith stated that his impression remained unchanged that appellant was incapable of sustained gainful employment. "[Appellant's] condition in fact will deteriorate," he stated. "I have expressed this opinion on at least two previous occasions and remain firm in this opinion."

On October 10, 2006 the Office informed appellant that his reasons for refusing to accept the offered position were not valid. It gave him 15 days to accept the offer or lose his entitlement to wage-loss and schedule award benefits.

In a decision dated January 25, 2007, the Office terminated appellant's compensation under 5 U.S.C. § 8106(c)(2) for refusing an offer of suitable work. It noted that Dr. Sukin provided his opinion that appellant could perform light or sedentary work for two hours a day. The Office found that Dr. Smith failed to provide new comments when asked to review Dr. Sukin's report and the position description. It had provided Dr. Sukin with surveillance video of appellant's outdoor activities and found that the opinion of appellant's physician had diminished probative value because he was not apprised of those activities.

On May 18, 2007 Dr. Smith repeated appellant's history and findings and his opinion that appellant was no longer capable of sustained gainful employment. "[Appellant] might be able to carry out certain activities occasionally," he stated, "but not on a long-term basis." Dr. Smith described his clinical findings from May 15, 2007. He reviewed the surveillance video and explained that appellant's ability to carry out such activities on a given day was not at all inconsistent with his chronic back pain. Dr. Smith stated, however, that appellant would be unable to carry those activities on a daily basis.

Reviewing Dr. Sukin's report, Dr. Smith noted that the second-opinion physician related that appellant "may" be able to do a light to sedentary job "up to" a total of two hours per day. There was no definite conclusion, he stated, that appellant could do these activities on a regular

basis. Dr. Smith concluded: "It is my opinion that [appellant] is incapable of sustaining gainful employment and that his condition will continue to deteriorate and may in fact require more surgical treatment for his low back and most likely his knees as well."

On June 19, 2007 Dr. Anup S. Sidhu, appellant's psychiatrist, reported that appellant had been a patient of his since November 27, 2002. He felt that the instability of appellant's moods was aggravated by his medical condition and he did not feel that appellant could work, even in a sedentary position.

On June 26, 2007 Dr. Smith addressed the duties of the offered position: "On a given day I am certain that [appellant] could carry out the principle duties and responsibilities detailed in the job description. The problem is that he could not carry out these duties on a predictable daily basis." Dr. Smith noted that appellant was under treatment for chronic pain and was taking significant doses of Schedule I and at times Schedule II narcotics. He stated that appellant also had poor equilibrium and 'not infrequent' falls. Dr. Smith continued:

> "I feel that [appellant's] work activities would be inconsistent and that the side effects of the medications he takes could cause somnolence and compromised judgment. I again want to emphasize that [his] condition is only going to deteriorate from its present state. I predict that [appellant] will have more debilitating problems with [his] spine which might necessitate further treatments in addition to the epidural steroid injections he is now receiving. His knees will undoubtedly wear out and require revision surgery and his general medical condition continues to deteriorate."

In a decision dated October 4, 2007, an Office hearing representative affirmed the termination of appellant's compensation. The hearing representative found that the job offer met the restrictions assessed by Dr. Sukin and was compatible with the responsibilities Dr. Smith stated he could perform.

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for him is not entitled to compensation.[2] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.[3] In other words, to justify termination of

[2] 5 U.S.C. § 8106(c)(2).

[3] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.[4]

Section 8123 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.[5]

ANALYSIS

The Office terminated compensation under 5 U.S.C. § 8106(c)(2) on the grounds that appellant refused an offer of suitable work. It bears the burden of proof to justify imposing such a penalty. The Office has the burden of showing that the work offered to and refused by appellant was suitable.

The Office based its suitability finding on Dr. Sukin's May 17, 2006 report. Dr. Sukin, the referral orthopedic surgeon, concluded that appellant "may be able" to do a light to sedentary job up to a total of two hours per day, but Dr. Smith, the attending orthopedist, disagreed. He made clear since 1998 that appellant would never be able to return to gainful employment. On May 18, 2007 Dr. Smith reviewed Dr. Sukin's report and unequivocally opined that appellant was incapable of sustaining gainful employment.

Dr. Smith had regularly examined appellant since 1974. He addressed appellant's history, symptoms, physical findings and diagnostic testing. Dr. Smith noted a deterioration of appellant's condition and advised that he was totally disabled for work. The Board finds that his opinion on the suitability of the offered position is as authoritative and probative as the opinion provided by Dr. Sukin.

If the attending physician finds that the claimant should not perform the duties of the offered position and a second opinion specialist states that claimant can in fact perform those duties, then a conflict in the medical evidence exists as to whether the position offered can be considered suitable.[6]

The Board finds a conflict in medical opinion necessitating referral to an impartial medical specialist under section 8123(a) of the Act. Due to the unresolved conflict in medical opinion, the weight of the evidence does not establish the suitability of the offered position. The Board finds that the Office did not discharge its burden of proof to justify the termination of

[4] *Glen L. Sinclair*, 36 ECAB 664 (1985).

[5] 5 U.S.C. § 8123(a).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5.a(4)(b) (July 1997).

appellant's compensation under section 8106(c)(2). The Board will reverse the Office's January 25 and October 4, 2007 decisions.[7]

CONCLUSION

The Board finds that the Office did not meet its burden to terminate appellant's compensation under 5 U.S.C. § 8106(c)(2). There is an unresolved conflict in medical opinion on whether the offered position is suitable.

ORDER

IT IS HEREBY ORDERED THAT the October 4 and January 25, 2007 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: March 16, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[7] The Office cannot render a decision that considers evidence in an investigative memorandum until the investigative memorandum and any supporting documentation is included in the case record. The Act Circular No. 08-04 (issued March 31, 2008). The Office also has the responsibility to make the claimant aware that it is providing video evidence to a medical expert. *J.M.*, 58 ECAB ___ (Docket No. 06-661, issued April 25, 2007); *R.C.*, 60 ECAB ___ (Docket No. 08-1641, issued January 12, 2009).