United States Department of Labor
Employees' Compensation Appeals Board

W.C., Appellant **and** **DEPARTMENT OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION, Whitesburg, KY, Employer**	)	**Docket No. 09-1435** **Issued: April 19, 2010**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 20, 2009 appellant filed a timely appeal from the July 18, 2008 merit decision of the Office of Workers' Compensation Programs terminating his compensation and a February 27, 2009 decision denying his request for further merit review of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, 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 18, 2008 on the grounds that he refused an offer of suitable work; and (2) whether the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

The Office accepted that on February 8, 2007 appellant, then a 58-year-old mine inspector, sustained a tear of the medial meniscus of his left knee due to a fall at work. On August 31, 2007 appellant underwent a medial meniscectomy and chondroplasty of the

patellofemoral articulation of his left knee. The procedure was authorized by the Office. Appellant stopped work for various periods and received appropriate disability compensation.

On December 26, 2007 Dr. Keith B. Hall, an attending Board-certified orthopedic surgeon, stated that appellant reported he could not kneel and his left knee pain was a 4 or 5 out of a scale of 10. On examination, appellant's left knee revealed a well-healed arthroscopy, range of motion from 0 to 120 degrees with patellar crepitus, stability to varus and valgus stress and discomfort with patellar compression. Quadriceps strength was found to be 5/5, sensation to light touch was intact and posterior tibial pulse was 2/4. Dr. Hall diagnosed medial meniscal tear and patellar chondromalacia of the left knee and found that appellant had reached maximum medical improvement. He stated:

> "His pain at this point seems to be limiting his patellofemoral articulation where he has significant chondromalacia noted during the surgery. I informed him I feel as though he will most likely continue to have this from now on. At this point, I will allow him to return to work with restrictions of no kneeling or crawling."[1]

On March 10, 2008 the employing establishment offered appellant a full-time position as a physical science technician.[2] The position involved maintaining equipment used in coal mine inspections and providing advice in support of such inspections. It did not require squatting below 48 inches or kneeling on the left knee. The majority of the work was performed at fixed benches or calibration stations and required some standing, stooping and moderate lifting. The position did not require work in the active areas of coal mines.

In an April 10, 2008 letter, appellant indicated that he was neither accepting nor declining the job offer but noted that he was off work indefinitely under his physician's orders. In an April 10, 2008 note, Dr. Shane McDougal, an attending Board-certified family practitioner, stated that appellant was "off work indefinitely" secondary to degenerative disc disease of the lumbar and cervical spines and chronic left knee pain.

In a May 7, 2008 letter, the Office advised appellant of its determination that the physical science technician position offered by the employing establishment was suitable.[3] It informed appellant that his wage-loss 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.

On June 6, 2008 appellant advised an Office claims examiner by telephone that he was not accepting the physical science technician position because he had been approved to receive benefits from the Social Security Administration. On June 25, 2008 Dr. McDougal stated that

[1] In a December 26, 2007 work restrictions form, Dr. Hall indicated that appellant could work for eight hours a day with no kneeling or squatting and could only work in coal seams which were 48 inches or higher.

[2] It appears that beginning December 17, 2007 appellant returned to light-duty work for the employing establishment on a temporary basis and the March 14, 2008 job offer was intended to provide him with permanent work.

[3] On May 6, 2008 the Office reconfirmed with the employing establishment that the offered position was still available to appellant.

appellant was still under his care and had not been released to return to work. On June 27, 2008 he advised that appellant could not perform his job duties due to his left knee injury and multiple other arthralgias. On May 7, 2008 Dr. McDougal diagnosed a severe cervical strain and the findings of May 29, 2008 diagnostic testing of appellant's cervical spine showed degenerative changes between C2-3 and C5-6.[4]

In a June 17, 2008 letter, the Office advised appellant that his reasons for not accepting the position offered by the employing establishment were unjustified. It notified him that his compensation would be terminated if he did not accept the position within 15 days of the date of the letter.[5]

In a July 18, 2008 decision, the Office terminated appellant's compensation effective that day on the grounds that he refused an offer of suitable work.

On January 27, 2009 appellant requested reconsideration of his claim. In a January 24, 2009 letter, he contended that the Office improperly denied his schedule award claim and reasserted that his physical condition prevented him from performing the physical science technician position.[6] Appellant submitted an August 31, 2007 surgery report and a November 12, 2007 physical therapy note which had previously been submitted and considered by the Office. He also submitted a January 12, 2009 schedule award claim and various administrative documents regarding requests for medical services.

In a February 27, 2009 decision, the Office denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

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."[7] However, to justify such termination, the Office must show that the work offered was suitable.[8] 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.[9]

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[4] Other medical notes from this period showed that appellant also complained of chest and left arm pain.

[5] Appellant did not accept the position within the allotted time period.

[6] In a January 16, 2009 informational letter, the Office advised appellant that the July 18, 2008 termination of his compensation precluded his receipt of schedule award compensation.

[7] 5 U.S.C. § 8106(c)(2).

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

[9] 20 C.F.R. § 10.517; *see Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

ANALYSIS -- ISSUE 1

The Office accepted that on February 8, 2007 appellant sustained a tear of the medial meniscus of his left knee due to a fall at work. On August 31, 2007 appellant underwent a medial meniscectomy and chondroplasty of the patellofemoral articulation of his left knee. In a July 18, 2008 decision, the Office terminated his compensation on the grounds that he refused an offer of suitable work.

The evidence of record establishes that appellant is capable of performing the physical science technician position offered by the employing establishment and determined to be suitable by the Office. The position involves maintaining equipment used in coal mine inspections and providing advice in support of such inspections. It does not require crawling, kneeling or squatting. The majority of the work is performed at fixed benches or calibration stations and the position requires some standing, stooping and moderate lifting. The record does not reveal that the physical science technician position was temporary or seasonal in nature.[10]

In finding that appellant is physically capable of performing the physical science technician position, the Office properly relied on the opinion of Dr. Hall, an attending Board-certified orthopedic surgeon. In December 26, 2007 reports, Dr. Hall determined that appellant could perform work on a full-time basis with restrictions from kneeling, crawling, squatting and working in coal seams which were less than 48 inches high.[11]

The Board finds that Dr. Hall's work restrictions would allow appellant to perform the duties of the physical science technician position. Moreover, there is no evidence that appellant was not vocationally able to perform the physical science technician position. He had previously worked as a mine inspector and the offered position involved working with equipment used in mine inspections. The Board finds that the Office established that the physical science technician position offered by the employing establishment was suitable for appellant's residuals and vocational abilities.

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. The Board has carefully reviewed the evidence and argument submitted by appellant in support of his refusal of the physical science technician position. Appellant did not support his refusal of the position. On April 10, 2008 Dr. McDougal, an attending Board-certified family practitioner, stated that appellant was "off work indefinitely" secondary to degenerative disc disease of the lumbar and cervical spines and chronic left knee pain. On June 27, 2008 he indicated that appellant could not perform his job duties due to his left knee injury and multiple other arthralgias. These reports, however, are of limited probative value on the relevant issue of the present case in that Dr. McDougal did not

[10] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4b (July 1997).

[11] Dr. Hall performed a physical examination at this time noting that appellant's left knee revealed a well-healed arthroscopy, range of motion from 0 to 120 degrees with patellar crepitus, stability to varus and valgus stress and discomfort with patellar compression. Quadriceps strength was found to be 5/5, sensation to light touch was intact and posterior tibial pulse was 2/4.

provide adequate medical rationale in support of his stated opinion.[12] Dr. McDougal did not describe appellant's medical condition in any detail or explain how his particular medical problems rendered him unable to perform the duties of the physical science technician position. He did not address the findings by Dr. Hall or the physician's opinion that appellant was capable of modified duty as offered. On appeal appellant argued that the fact that he was accepted for Social Security Administration benefits showed that he could not work. However, the Board has long held that entitlement to benefits under statutes administered by other federal agencies does not establish disability or entitlement to benefits under the Act.[13]

For these reasons, the Office properly terminated appellant's compensation effective July 18, 2008 on the grounds that he refused an offer of suitable work.[14]

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[15] 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.[16] 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.[17] 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.[18] The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record[19] and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[20]

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[12] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (finding that a medical opinion not fortified by medical rationale is of little probative value).

[13] *See Donald Johnson*, 44 ECAB 540, 551 (1993). On appeal appellant also argued that the fact that he was in pain and under a physician's care showed that he could not perform the offered position. However, appellant's mere claims in this regard would not serve as a substitute for rationalized medical evidence showing that he could not perform the position.

[14] 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 physical science technician 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).

[15] 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).

[16] 20 C.F.R. § 10.606(b)(2).

[17] *Id.* at § 10.607(a).

[18] *Id.* at § 10.608(b).

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

[20] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

ANALYSIS -- ISSUE 2

On reconsideration, appellant argued that his physical condition prevented him from performing the physical science technician position. He also submitted an August 31, 2007 surgery report and a November 12, 2007 physical therapy note which had previously been submitted and considered by the Office. The submission of this argument and evidence would not require the reopening of appellant's claim for further review of the merits because the Office has already considered this argument and evidence.[21] Appellant also submitted a January 12, 2009 schedule award claim and various administrative documents regarding requests for medical services. The submission of these documents would not require the reopening of appellant's claim because the documents are not relevant to the main issue of the present case, *i.e.,* whether the Office properly justified the termination of appellant's compensation for refusing suitable work.[22] The documents do not relate to appellant's assertion that he was justified in refusing the position offered by the employing establishment.

Appellant has not established that the Office improperly denied his request for further review of the merits of its July 18, 2008 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 18, 2008 on the grounds that he refused an offer of suitable work. The Board further finds that the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[21] *See supra* note 19.

[22] *See supra* note 20.

ORDER

IT IS HEREBY ORDERED THAT the February 27, 2009 and July 18, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 19, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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