United States Department of Labor
Employees' Compensation Appeals Board

R.T., Appellant	)	
and	)	**Docket No. 09-1133**
	)	**Issued: January 26, 2010**
DEPARTMENT OF THE NAVY, CRANE AMMUNITION DEPOT, Crane, IN, Employer	)	

Appearances:
David S. McCrea, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 24, 2009 appellant filed a timely appeal from a January 26, 2009 decision of the Office of Workers' Compensation Programs denying his reconsideration request. The Board also has jurisdiction over a June 9, 2008 decision terminating appellant's compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit decision terminating appellant's compensation benefits and the January 26, 2009 nonmerit decision.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's wage-loss compensation benefits on the grounds that he refused an offer of suitable work; and (2) whether it properly denied appellant's request for reconsideration.

On appeal, appellant, through his attorney, contends that the Office wrongly terminated his compensation as the offered position was not suitable work within his medical limitations. He asserts that the Office erred by relying on the opinion of Dr. James B. Rickert, a Board-

certified orthopedic surgeon and second opinion physician, who failed to assess his work limitations.[1]

FACTUAL HISTORY

The Office accepted that on November 1, 1967 appellant, then a 29-year-old ordnance worker, sustained a lumbar strain, aggravation of an L5-S1 spondylolisthesis and herniated L4-5 disc due to a heavy lifting incident. Appellant underwent posterior lateral spinal fusion at L4-5 and L5-S1 on August 21, 1968. He received compensation for intermittent work absences. Appellant stopped work in March 1970 and did not return. He received total disability compensation beginning in June 1972. On January 24, 1979 appellant sustained a severe heart attack, unrelated to his federal employment. He underwent angioplasty in January 1992.

Dr. Wayne W. Kotcamp, an attending orthopedic surgeon, followed appellant from December 1981 to August 1997.[2] He found limited lumbar motion, positive straight leg raising tests bilaterally, postfusion syndrome, the gradual onset of spinal stenosis at L3 and a pseudoarthrosis at L4. Dr. Kotcamp found appellant totally disabled for work due to back pain and limited motion. Dr. Carter Heinrich, an attending Board-certified cardiologist, treated appellant for his nonoccupational cardiac condition. In a May 15, 1997 report, he diagnosed a severe left ventricular dysfunction necessitating "severe activity restrictions."[3]

On November 8, 2006 the Office referred appellant, a statement of accepted facts and the medical record to Dr. Rickert, a Board-certified orthopedic surgeon, for a second opinion examination. In a November 30, 2006 report, Dr. Rickert reviewed the medical record and statement of accepted facts. He noted lumbar pain and stiffness and cardiac limitations. On examination, Dr. Rickert found limited lumbar motion and bilateral hamstring tightness. He diagnosed status post fusion and a natural progression of underlying lumbar spondylosis. Dr. Rickert opined that appellant could perform light-duty work for 8 hours a day with lifting limited to 20 pounds, bending or stooping no more than 1 hour, limited climbing and a 15-minute break every 2 hours.

On May 1, 2007 the Office referred appellant for vocational rehabilitation services. In a June 2007 report, a vocational rehabilitation counselor met with appellant to discuss reemployment at the employing establishment.

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[1] On appeal, appellant, through his attorney, submitted additional evidence. The Board may not consider evidence for the first time on appeal that was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c).

[2] On September 19, 1985 the Office obtained a second opinion examination from Dr. James H. Booze, an orthopedic surgeon, who found appellant able to perform sedentary work for eight hours a day. In a September 5, 1986 report, Dr. Stanley W. Collis, a Board-certified orthopedic surgeon, opined that appellant could perform full-time sedentary duty. He noted that he did not address any cardiac limitations.

[3] In memoranda from July to September 1997, the Office found that there were no part-time sedentary jobs within appellant's medical restrictions available in his commuting area. It closed a proposed vocational rehabilitation effort. In a March 27, 1998 memorandum, the Office noted that, due to appellant's nonoccupational heart condition, there was "no potential for a suitable offer of employment" from the employing establishment.

In an undated letter, the employing establishment offered appellant a full-time position as a GS-1 clerk. Appellant would work a 10-hour shift from 6:30 am to 5:00 p.m. Monday to Thursday, performing clerical tasks as directed, with no lifting over 20 pounds and no repetitive bending or climbing. He would be allowed to sit or stand at will and have a 15-minute break every 2 hours. The position would become available on June 25, 2007.

On June 19, 2007 appellant declined the offered clerk position. He stated that the strain of driving to and from the employing establishment on June 8, 2007 for a fitness-for-duty examination caused three days of back and leg pain.

In a July 9, 2007 letter, the Office advised appellant that the offered clerk position was suitable work and that the position remained open and available. It explained that, under the Act, refusing an offer of suitable work would lead to termination of his wage-loss compensation benefits. Appellant was afforded 30 days to accept the offered job or provide valid reasons for his refusal.

In a July 15, 2007 letter, appellant again declined the offered clerk position. He stated that he could not work a 10-hour schedule due to interrupted sleep and continuous back and leg pain. Appellant contended that Dr. Rickert did not examine him.

In an August 14, 2007 letter, the Office advised appellant that he failed to present a valid reason for refusing the offered position. Appellant had 15 days to accept the position or his entitlement to wage-loss and schedule award benefits would be terminated. As of September 6, 2007, he did not contact the employing establishment about the job offer. The position remained open and available.

By decision dated September 20, 2007, the Office terminated appellant's entitlement to wage-loss and schedule award compensation benefits effective September 29, 2007 under section 8106(c) of the Act on the grounds that he refused an offer of suitable work. It noted that his case remained open for medical treatment of the accepted injury.

In a letter dated October 11 and postmarked October 12, 2007, appellant requested an oral hearing. In a November 13, 2007 letter, he asserted that Dr. Rickert was not qualified to treat back injuries and misstated his medical history. At the hearing, held February 26, 2008, appellant contended that he could not work 10 hours a day or drive 1 hour each way to and from the employing establishment.

By decision dated and finalized June 9, 2008, an Office hearing representative affirmed the Office's September 20, 2007 decision. The hearing representative found that appellant had not provided valid reasons for refusing the position or established that the offered position was not suitable work.

In a December 2, 2008 letter, appellant requested reconsideration, reiterating his contentions that Dr. Rickert was unqualified and inaccurate. Dr. Rickert submitted a July 30, 2008 letter from Dr. John W. Collier, an attending Board-certified family practitioner, who noted reviewing the medical record and opined there was a "considerable difference between what [appellant was] able to tolerate from a physical exertion standpoint" and Dr. Rickert's November 30, 2006 examination.

By decision dated January 26, 2009, the Office denied appellant's request for reconsideration on the grounds that he failed to submit new, relevant evidence. It found that appellant's December 2, 2008 letter and Dr. Collier's July 30, 2008 letter did not provide new, relevant evidence that appellant was medically unable to perform the offered clerk position.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[4] In this case, the Office terminated appellant's compensation under section 8106(c)(2) of the Act, which 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."[5] To justify termination of compensation, it must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[6] For conditions not accepted by the Office as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation.[7] Once the Office establishes that the work offered was suitable, the burden of proof shifts to the employee who refuses to work to show that such refusal was reasonable or justified.[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]

Section 10.517(a) of the Act's implementing regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured by the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.[10] Pursuant to section 10.516, the employee shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.[11] 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.[12]

[4] *Linda D. Guerrero*, 54 ECAB 556 (2003); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[5] 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

[6] *Ronald M. Jones*, 52 ECAB 190 (2000).

[7] *Alice J. Tysinger*, 51 ECAB 638 (2000).

[8] *Bryant F. Blackmon*, 56 ECAB 752 (2005).

[9] *Joan F. Burke*, 54 ECAB 406 (2003); s*ee Robert Dickerson*, 46 ECAB 1002 (1995).

[10] 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 6.

[11] *Id.* at § 10.516.

[12] *Kathy E. Murray*, 55 ECAB 288 (2004).

ANALYSIS

The Office accepted that, on November 1, 1967, appellant sustained lumbar injuries necessitating a multilevel fusion. His attending physicians found him totally disabled through 1997. In November 2006, the Office obtained a second opinion examination of Dr. Rickert, a Board-certified orthopedic surgeon, who found appellant capable of restricted sedentary work eight hours a day. The employing establishment offered appellant a job as a clerk for 10 hours a day, which the Office found to be suitable work based on Dr. Rickert's opinion. Appellant declined the position, asserting that he could not work 10 hours a day. The Office then terminated his entitlement to wage-loss compensation benefits effective September 29, 2007, affirmed by decision dated June 9, 2008.

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation under 5 U.S.C. § 8106(c)(2). The Office did not establish that the offered clerk position was suitable work. Dr. Rickert opined that appellant could work eight hours a day with restrictions. The offered clerk position required a 10-hour work shift. The 10-hour work schedule is in excess of the 8-hour schedule delineated by Dr. Rickert. The offered clerk position exceeds appellant's medical restrictions. It is not suitable work. For this reason, the Board will reverse the Office's June 9, 2008 decision.

In light of the Board's disposition of issue number one, the issue regarding the denial of reconsideration is moot.

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation benefits. The offered position was not suitable work.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 9, 2008 is reversed. The January 26, 2009 decision regarding the denial of reconsideration is moot.

Issued: January 26, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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