United States Department of Labor
Employees' Compensation Appeals Board

M.K., Appellant	)	
and	)	**Docket No. 09-2209**
	)	**Issued: July 20, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Fairhope, AL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 2, 2009 appellant filed a timely appeal from the August 5, 2009 merit decision of the Office of Workers' Compensation Programs terminating his compensation. 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 December 30, 2008 on the grounds that he refused an offer of suitable work.

FACTUAL HISTORY

The Office accepted that on May 8, 2006 appellant, then a 40-year-old city letter carrier, sustained a lumbar sprain due to lifting mail at work. Appellant continued working in a limited-duty position on a full-time basis. He stopped work on March 23, 2007 and did not return. On

January 17, 2008 the Office accepted that appellant sustained lumbar disc displacement without myelopathy. It paid him wage-loss compensation for periods of disability.[1]

On October 23, 2008 the employing establishment offered appellant a position as a modified city carrier on a full-time basis in Mobile, AL. The job included such duties as casing mail for an assigned delivery route, scanning mail and delivery confirmations and answering the telephone. The physical requirements of the modified job consisted of intermittent lifting, pushing and pulling no more than 10 pounds for a total of eight hours per day; intermittent walking, standing and sitting for three hours (for each task) during an eight-hour workday; intermittent reaching above the shoulder, squatting and kneeling for three hours (for each task) during an eight-hour workday; and constant and frequent use of the fingers and hands for grasping. To accommodate appellant's standing restriction, a stool would be provided and, in order to accommodate his lifting restriction, assistance would be provided for items weighing more than 10 pounds. On October 29, 2008 appellant rejected the modified city carrier position job offer.

On August 25, 2008 Dr. Raymond Fletcher, a Board-certified orthopedic surgeon who served as an Office referral physician, discussed appellant's medical condition, including his May 6, 2006 employment injury and the treatment he received since that time. He advised that magnetic resonance imaging (MRI) scan testing of appellant's lumbar spine from December 2006 and March 25, 2008 showed a right foraminal disc protrusion at L5-S1. Dr. Fletcher noted that physical examination revealed significant functional lumbar impairment with muscle spasm and tight hamstring muscles. He stated that appellant had permanent aggravation of lumbar spondylosis with residual impairment and that his work injury contributed to his medical condition. The treatment recommendations included resuming current pain management, epidural steroid injections and physical therapy. Appellant was unable to work full duty as a city letter carrier at the employing establishment. Dr. Fletcher advised, however, that appellant could work eight hours a day at the sedentary work level. His work restrictions included sitting for up to three hours per day, walking up to three hours, standing for three hours, reaching for three hours, reaching above the shoulders for three hours, twisting for three hours, bending/stooping for two hours, no operating a motor vehicle at work or climbing, operating a motor vehicle to and from work for two hours, pushing up to 10 pounds for three hours, lifting up to 10 pounds for three hours, lifting up to 10 pounds for three hours, squatting with up to 10 pounds for three hours and kneeling with up to 10 pounds for three hours.[2]

In an October 16, 2008 report, Dr. Robert L. White, an attending neurosurgeon, stated that appellant's chief complaint was back and right leg pain. He noted that there were no surgical plans and advised that conservative management options were explained to appellant.

[1] Appellant participated in Office-sponsored vocational rehabilitation efforts without success.

[2] Dr. Fletcher also completed a work restriction form which delineated the same work restrictions.

Dr. White stated that appellant had been treated with conservative methods such as physical therapy and spinal epidural injections.[3]

In a November 19, 2008 letter, the Office advised appellant of its determination that the position offered by the employer was suitable. On November 17, 2008 the employing establishment confirmed that the position was still available. The Office 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 did not respond to the Office's November 19, 2008 letter.

In a December 30, 2008 decision, the Office terminated appellant's compensation effective that day. It found that he refused an offer of suitable work. The Office noted that the opinion of Dr. Fletcher established that appellant could perform the offered position and he did not provide good cause for not accepting suitable work.

In a January 20, 2009 report, Dr. Julia M. Dannelley, an attending Board-certified family practitioner, stated that she and her colleagues had followed appellant for a back injury related to his work. It had come to her attention that appellant had been offered a job "not terribly dissimilar from previous duties." Dr. Dannelley stated that accepting this job was inadvisable from physical and psychological standpoints. She advised that appellant suffered chronic pain and that it was doubtful he could make it through the day without inordinate suffering. Dr. Dannelley stated:

> "The injury that [appellant] has suffered has also led to significant deterioration in a chronic psychiatric illness he suffers from. This malady has become of serious intensity in the last few months. [Appellant] has documented post-traumatic stress disorder and is treated for this through the [Veterans Administration] mental health service. He even had an inpatient psychiatric stay several months ago when he decompensated under the emotional and mental stress of dealing with financial difficulties and aggravation associated with his injury. I would strongly recommend against [appellant] returning to work at the employing establishment. I fear that he would not be able to keep up with the pace because of his physical and emotional problems. I am most certain that he would decompensate. I am unsure what form this decompensation would take but I am sure it would be to no one's benefit. Rather than deal with this very likely outcome, I would recommend [appellant] be retired now that he has been awarded his social security benefits."

In a May 20, 2009 report, Dr. Daniel L. Koch, an attending clinical psychologist, described appellant's factual and medical history and diagnosed post-traumatic stress disorder, skin disorder and pain disorder, including chronic back, right hip and leg pain. He noted that the results of diagnostic testing revealed that appellant had mild neuropsychological deficits.

[3] In a December 2, 2008 report, Dr. Edward M. Schnitzer, an attending Board-certified internist, stated that appellant reported that he had persistent pain and aching in his low back and right leg. He indicated that on examination there was no paraspinal muscle spasm and that strength in the lower extremities was normal. Dr. Schnitzer stated that appellant would "remain out of work until next visit."

Appellant suffered from post-traumatic stress disorder resulting from a "near death" motor vehicle accident in 1986, took antidepressants and attended weekly group therapy to help with symptoms. He reported that he was in constant pain from his work injury and unable to stand for long periods. Dr. Koch stated:

> "The patient is advised to continue his antidepressant medications. He will be referred to an orthopedic surgeon for a current assessment of his back condition. If a second opinion is no surgical intervention then it is possible that the patient will be disabled from his postal job unless an appropriate accommodation can be made in the workplace. Referral to a pain management specialist will be necessary. If no surgical relief is possible, the patient will be … permanently disabled."

Appellant requested a hearing before an Office hearing representative that was held on May 13, 2009. He provided a history of his injury, a description of his regular job duties and reasons why he could not do the limited-duty job provided to him. Appellant asserted that he would not be able to stand, bend or lift. He also discussed a history of post-traumatic stress disorder from his military career, which had been present prior to the time he sustained his May 6, 2006 work injury.

In an August 5, 2009 decision, the Office hearing representative affirmed the December 30, 2008 decision. She found that the reports of Dr. Dannelley and Dr. Koch did not establish that the position offered to appellant was unsuitable.

LEGAL PRECEDENT

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."[4] However, to justify such termination, the Office must show that the work offered was suitable.[5] 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.[6]

ANALYSIS

The Office accepted that on May 8, 2006 appellant sustained a lumbar sprain and lumbar disc displacement without myelopathy due to lifting mail at work. Appellant stopped work on March 23, 2007 and did not return. The Office terminated his monetary compensation effective December 30, 2008 on the grounds that he refused an offer of suitable work.

The evidence of record establishes that appellant was capable of performing the modified city carrier position offered by the employing establishment in October 2008 and determined to

[4] 5 U.S.C. § 8106(c)(2).

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

[6] 20 C.F.R. § 10.517; *see Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

be suitable by the Office in November 2008. The physical requirements of the modified job consisted of intermittent lifting, pushing and pulling no more than 10 pounds for a total of eight hours per day; intermittent walking, standing and sitting for three hours (for each task) during an eight-hour workday; intermittent reaching above the shoulder, squatting and kneeling for three hours (for each task) during an eight-hour workday; and constant and frequent use of the fingers and hands for grasping. To accommodate appellant's standing restriction, a stool would be provided and, in order to accommodate his lifting restriction, assistance would be provided for items weighing more than 10 pounds.[7]

In determining that appellant was physically capable of performing the modified city carrier position, the Office properly relied on the opinion of Dr. Fletcher, a Board-certified orthopedic surgeon who served as an Office referral physician. On August 25, 2008 Dr. Fletcher noted that physical examination revealed significant functional lumbar impairment with muscle spasm and tight hamstring muscles. The treatment recommendations included resuming current pain management, epidural steroid injections and physical therapy. Dr. Fletcher found that appellant was unable to work full duty as a regular city letter carrier, but could work eight hours a day at the sedentary work level. His work restrictions included sitting for up to three hours per day, walking up to three hours, standing for three hours, reaching for three hours, reaching above the shoulders for three hours, twisting for three hours, bending/stooping for two hours, pushing up to 10 pounds for three hours, lifting up to 10 pounds for three hours, lifting up to 10 pounds for three hours, squatting with up to 10 pounds for three hours and kneeling with up to 10 pounds for three hours.

The Board notes that the work restrictions provided by Dr. Fletcher allowed appellant to perform the modified city carrier position offered by the employing establishment. The Board finds that, the Office established that the modified city carrier position offered by the employing establishment was 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. The Board has carefully reviewed the evidence and argument submitted by appellant in support of his refusal of the modified city carrier position and finds that it is not sufficient to justify his refusal of the position.

In a December 2, 2008 report, Dr. Schnitzer, an attending Board-certified internist, stated that appellant reported persistent pain and aching in his low back and right leg. He stated that appellant would "remain out of work until next visit." This report is of limited probative value on the issue of suitable work as Dr. Schnitzer did not provide any explanation for his conclusion that appellant could not work. He only provided limited findings on examination and did not address the modified-duty job offer. Dr. Schnitzer indicated that on examination there was no paraspinal muscle spasm and that strength in the lower extremities was normal.

[7] There is no indication that appellant was not vocationally capable of performing the position. The record does not reveal that the modified city carrier position was temporary or seasonal in nature. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4b (July 1997).

In a January 20, 2009 report, Dr. Dannelley, an attending Board-certified family practitioner, stated that it had come to her attention that appellant had been offered a job "not terribly dissimilar from previous duties." She noted that accepting this job was inadvisable from physical and psychological standpoints because he suffered chronic pain and it was doubtful that he could make it through the day without inordinate suffering. She asserted that appellant's emotional condition might cause problems in the future. Dr. Dannelley did not present any objective findings to support her opinion on disability. Moreover, her opinion is speculative on appellant's capacity for work. Dr. Dannelley did not clearly state that she had reviewed the duties of the job offer made to appellant. Her opinion is of diminished probative view. It is also well established that the possibility of future injury constitutes no basis for the payment of compensation.[8]

In a May 20, 2009 report, Dr. Koch, an attending clinical psychologist, described appellant's medical history and diagnosed post-traumatic stress disorder, skin disorder and pain disorder. He discussed the treatment for appellant's emotional condition but did not provide any indication that this condition prevented appellant from working as a modified city carrier. Dr. Koch suggested that appellant might have an orthopedic disability in the future, but as a clinical psychologist he would not be competent to provide an opinion on orthopedic condition. As noted, the possibility of future injury or disability is not a basis for payment of compensation.

For these reasons, the Office properly terminated appellant compensation effective December 30, 2008 on the grounds that he refused an offer of suitable work.[9]

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation effective December 30, 2008 on the grounds that he refused an offer of suitable work.

[8] *Gaeten F. Valenza*, 39 ECAB 1349, 1356 (1988). Moreover, Dr. Dannelley did not provide any description of the modified city carrier position or explain why appellant could not perform the job.

[9] The Board notes that the Office complied with its procedural requirements prior to terminating appellant's compensation, including providing him with an opportunity to accept the modified city clerk position. Because appellant did not respond to the Office's November 18, 2008 suitability letter or otherwise provide reasons for refusing the position, it was not necessary to provide him with another opportunity to accept the position; *see generally Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

ORDER

IT IS HEREBY ORDERED THAT the August 5, 2009 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: July 20, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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