United States Department of Labor
Employees' Compensation Appeals Board

W.S., Appellant	)	
and	)	**Docket No. 09-2239**
	)	**Issued: June 22, 2010**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Alexandria, LA, Employer	)	

Appearances:
Alan J. Shapiro, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 8, 2009 appellant filed an appeal from a July 30, 2009 decision of the Office of Workers' Compensation Programs. 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 benefits effective February 15, 2009 on the grounds that he refused an offer of suitable work pursuant to 5 U.S.C. § 8106(a). On appeal appellant's attorney asserts that the decision is contrary to fact and law.

FACTUAL HISTORY

On June 25, 2008 appellant, then a 61-year-old utility systems operator, sustained an employment-related closed fracture of a lumbar vertebra without spinal cord injury when he fell from the third rung of a ladder, landing on his buttocks. He stopped work that day, received

appropriate continuation of pay and was then placed on the periodic compensation rolls. Computerized tomography (CT) scans of the lumbar spine on June 25 and 27, 2008 and magnetic resonance imaging (MRI) scans on July 25 and August 12, 2008 demonstrated the compression fracture, borderline spinal stenosis at L3-4 and degenerative disc disease and disc bulging at L4-5 and L5-S1. Attending physicians Dr. Robert K. Rush, Board-certified in family and occupational medicine, and Dr. George R. Williams and Dr. Pierce D. Nunley, Board-certified orthopedic surgeons, provided reports dated July 2 to October 8, 2008 in which a compression fracture at L4, herniated disc, lumbar pain and lumbar radiculopathy were diagnosed. They advised that appellant could not work. The employing establishment forwarded a copy of appellant's position description.

On November 7, 2008 Dr. Nunley advised that appellant could return to light duty, desk-type work only, with no lifting greater than five pounds and no repetitive bending or twisting. On November 10, 2008 the Office referred appellant to Dr. John P. Sandifer, a Board-certified orthopedist, for a second opinion evaluation.

By letter dated November 24, 2008, the employing establishment offered appellant a modified position as secretary in human resources from 8:00 a.m. to 4:30 p.m. daily, with restrictions of light duty, desk-type work only, no lifting greater than five pounds and no repetitive bending or twisting. The position description indicated that the duties and responsibilities including performing a variety of clerical, administrative and technical duties in support of management; screening and receiving visitors; screening telephone calls; assembling and summarizing information from office records or other available resources; reviewing various publications; reading incoming correspondence, publications and directives to ensure compliance in accordance with established regulations; composing and reviewing correspondence; maintaining schedules and calendars; transcribing minutes of meetings and conferences; typing in correct format; being skilled in the use of word processing equipment and other software such as spreadsheets and graphics to process and produce a wide range of documents, some of which would require complex formats; maintaining official files; making arrangements for conferences; monitoring budget; completing other administrative duties. The position required in-depth practical knowledge of the operations, regulations, principles, programs and peculiarities of the human resources management service and its operating programs and knowledge and expertise in secretarial skills including typing and working at a computer and in processing statistical data and in operating office equipment. The work was characterized as sedentary with some walking, standing and light carrying.

In a November 25, 2008 report, Dr. Sandifer noted the history of injury and his review of the medical record including CT and MRI scan studies. He reported appellant's complaint of daily back, bilateral hip and thigh pain with some numbness in the left thigh, provided physical examination findings and diagnosed lumbar strain, compression fracture of the lumbar spine, spinal stenosis and radiculopathy affecting both legs. Dr. Sandifer advised that appellant's problems were directly related to the fall at work and underlying spinal stenosis, with a fair prognosis. He advised that maximum medical improvement had not been reached and that appellant could return to modified duty for four hours daily with an increase in the number of hours in six months. Sitting was restricted to 15 to 20 minutes at a time over 1-1/2 to 2 hours; standing and walking limited to 15 to 20 minutes every 2 to 2-1/2 hours; no repetitive bending or stooping; driving limited to 1/2 hour; and lifting restricted to 5 to 10 pounds occasionally.

Dr. Sandifer recommended epidural injections and a functional capacity evaluation six to nine months after the injury.

On December 1, 2008 appellant accepted the offered position "contingent upon my attending physician's approval" and advised by letter that he disagreed with Dr. Nunley's opinion that he could return to work because he could not physically do the job and would have to lie down every few hours. On December 3, 2008 the job offer was modified to a four-hour daily work schedule, from 8:00 a.m. to 12:00 p.m. A conference was held on December 4, 2008 with appellant, representatives from the employing establishment, a claims examiner, a case nurse and appellant's union representative participating. The physical requirements of the offered position were discussed and appellant stated that he was declining the job offer. By letter dated December 4, 2008, appellant withdrew his acceptance of the offered position, stating that he was not physically capable of performing the duties in reasonable comfort.

In a letter dated December 4, 2008, the Office advised appellant that the position offered was suitable. Appellant was notified that if he failed to report to work at the offered position or failed to demonstrate that the failure was justified, pursuant to section 8106(c) of the Federal Employees' Compensation Act,[1] his right to compensation would be terminated. He was given 30 days to respond. In a December 9, 2008 report, Dr. Melanie C. Firmin, a Board-certified anesthesiologist, noted that appellant had a lumbar epidural steroid injection. On January 5, 2009 the Office advised appellant that the reasons given for refusing to accept the offered position were not valid. Appellant was again notified of the penalty provisions of section 8106(c) and given an additional 15 days to accept the offered position. He submitted a December 5, 2008 treatment note from Dr. Firmin and a January 15, 2009 report from Dr. Clark A. Gunderson, a Board-certified orthopedic surgeon, who noted the history of injury, provided examination findings and noted appellant's complaints of low back pain with limited activity. Dr. Gunderson recommended a second epidural injection and referral to a bariatric surgeon.

By decision dated January 26, 2009, the Office terminated appellant's wage-loss compensation and schedule award compensation benefits, effective February 15, 2009, on the grounds that he declined an offer of suitable work. On February 9, 2009 appellant requested a hearing and submitted additional medical evidence including reports from Dr. Gunderson who continued to advise that appellant was totally disabled.

At the hearing, held telephonically on May 27, 2009, appellant, who was represented by an attorney, testified that he had extreme back pain that severely limited his activity. He stated that he had retired and described his job duties as maintaining and operating boilers that required heavy physical activity and that his physician had recommended surgery but that it could not be done until he lost weight. Appellant stated that he refused the offered position because he could not physically perform the duties and that he did not understand the letters sent to him by the Office. Dr. Gunderson submitted additional reports dated May 26 and June 25, 2008 in which he reiterated his findings and conclusions.

[1] 5 U.S.C. §§ 8101-8193.

By decision dated July 30, 2009, an Office hearing representative affirmed the January 26, 2009 decision. The hearing representative noted that appellant's treatment physician, Dr. Nunley, found him capable of limited-duty work and found that appellant refused an offer of suitable employment.

LEGAL PRECEDENT

Section 8106(c) of the 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."[2] It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[3] The implementing regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.[4] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[5] Office regulations advised that, in determining what constitutes "suitable work" for a particular disabled employee, the Office is to consider the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors.[6] Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.[7] 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.[8] It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.[9]

ANALYSIS

The merit issue in the instant case is whether the Office properly terminated appellant's compensation benefits on the grounds that he refused suitable work. The Board finds that the Office did not meet its burden of proof because the Office did not consider whether he had the

[2] 5 U.S.C. § 8106(c).

[3] *Joyce M. Doll*, 53 ECAB 790 (2002).

[4] 20 C.F.R. § 10.517(a).

[5] *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[6] 20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB 681 (2004).

[7] Federal (FECA) Procedure Manual, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5.a(1) (July 1997); *see Lorraine C. Hall*, 51 ECAB 477 (2000).

[8] *Gloria G. Godfrey*, 52 ECAB 486 (2001).

[9] *Richard P. Cortes*, 56 ECAB 200 (2004).

qualifications to perform such work. The record supports the determination that appellant had the physical capability to perform the offered secretarial position, based on the opinions of both his attending physician, Dr. Nunley, who advised that he could return to a limited-duty position that included the exact physical restrictions of the offered position and that of Dr. Sandifer, an Office referral physician, who advised that appellant could perform light duty for four hours daily.[10]

The Board, however, finds that the Office failed to properly consider whether appellant had the educational and vocational background to perform these duties. To determine if an offered position is suitable, the Office is to consider whether the employee has the qualifications to perform such work.[11] The duties and requirements of the offered secretarial position in human resources are described in an eight-page position description and are quite extensive. They include performing a variety of clerical, administrative technical duties including composing and reviewing correspondence; transcribing minutes of meetings and conferences; typing in a correct format; being skilled in the use of word processing equipment and other software such as spreadsheets and graphics to process and produce a wide range of documents, some of which would require complex formats; and further require an in-depth practical knowledge of the operations, regulations, principles, programs and peculiarities of the human resources management service and its operating programs and knowledge and expertise in secretarial skills including typing and working at a computer and in processing statistical data and in operating office equipment.

Appellant's position when he was injured was that of utility systems operator. A description for that position indicates that it is within the engineering service, utility plant section and requires skill and knowledge in air conditioning and boilers and basic mechanical ability of maintain, monitor and repair the equipment. The job description for utility systems operator does not indicate that appellant was required to perform any of the type duties required for the offered secretarial position. The record therefore does not establish that the offered position was suitable. The Office did not make any specific finding regarding whether appellant had the necessary educational or vocational skills to perform the position such as knowledge of software applications or the ability to type and transcribe. Consequently, as the evidence is insufficient to establish that appellant had the necessary educational and vocational skills, the Office erred in finding the offered position suitable and did not meet its burden of proof to terminate his monetary compensation under section 8106(c) of the Act.

CONCLUSION

The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits on the grounds that he refused an offer of suitable work.

[10] The Board notes that neither Office regulations nor Office procedures prohibit a part-time suitability offer. *See* 20 C.F.R. § 10.507; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4 (July 1997). Office procedures merely advise that a job is not suitable if it involves less than four hours of work per day when the claimant is capable of working four or more hours per day. Federal (FECA) Procedure Manual at Chapter 2.814.4b(1).

[11] *Supra* note 6.

ORDER

IT IS HEREBY ORDERED THAT the July 30, 2009 decision of the Office of Workers' Compensation Programs be reversed.

Issued: June 22, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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