

**United States Department of Labor
Employees' Compensation Appeals Board**

J.W., Appellant)
and) Docket No. 09-1282
DEPARTMENT OF THE ARMY, RED RIVER) Issued: March 15, 2010
DEPOT, Texarkana, TX, Employer)

)

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 20, 2009 appellant filed an appeal of the March 23, 2009 decision of the Office of Workers' Compensation Programs that affirmed the termination of wage-loss compensation on the grounds that he refused an offer of suitable work. 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 17, 2008 pursuant to 5 U.S.C. § 8106(a).

On appeal, appellant contends that he is totally disabled.

FACTUAL HISTORY

This case has previously been before the Board. The facts and the law as set forth in the Board's prior decision are hereby incorporated by reference.¹

The Office accepted appellant's claim for sprain of the lumbar region; degeneration of lumbar or lumbosacral intervertebral disc and displacement of a lumbar intervertebral disc without myelopathy. It paid appropriate compensation and disability benefits.

By letter dated June 11, 2007, the Office referred appellant to Dr. Robert E. Holladay, IV, a Board-certified orthopedic surgeon, for a second opinion. In a report dated July 5, 2007, Dr. Holladay listed diagnoses of degenerative disc disease, lumbar spine; strain and sprain, lumbar spine and protruding disc, lumbar spine. He indicated that appellant would have difficulty performing his previous work activities. Dr. Holladay recommended restricted activities particularly with standing and walking activities. He noted that appellant could perform activities in a sedated position with the use of upper extremities for grasping, fine manipulation, pushing, pulling and reaching overhead. Dr. Holladay completed a work capacity evaluation form indicating that appellant was limited to working a four-hour workday. He noted further restrictions in that appellant was unable to walk more than two hours or stand more than one hour. Dr. Holladay recommended reaching above the shoulder for less than one hour. Pushing, pulling and lifting was limited to less than 10 pounds and he was prohibited from lifting more than one hour a day. Dr. Holladay indicated that appellant could perform no twisting, bending/stooping, squatting, kneeling or climbing.

The Office forwarded the report of Dr. Holladay to appellant's treating Board-certified orthopedic surgeon, Dr. J.T. DeHaan, who indicated that he did not concur with Dr. Holladay's report. Dr. DeHaan indicated that he did not believe that appellant could walk or stand for three hours in a four-hour workday because his degenerative disc disease and degenerative joint disease of the spine were causing spinal stenosis. He also opined that appellant's medications would preclude him from returning to work. Dr. DeHaan completed a work capacity evaluation indicating that appellant could only work 1 to 2 hours a day, and limited sitting to 1 hour at a time, walking to 100 to 200 yards at a time and standing to 5 to 10 minutes at a time. He prohibited pushing, pulling and lifting of any weight; prohibited squatting, kneeling, climbing, twisting and bending/stooping. Dr. DeHaan indicated that appellant could not operate a motor vehicle due to the medication he was taking. He believed that these restrictions were permanent.

The Office found a conflict in medical opinion between appellant's treating physician, Dr. DeHaan, and the second opinion physician, Dr. Holladay, with regard to her capacity for work. By letter dated October 15, 2007, it referred appellant to Dr. Marco Ochoa, a Board-certified orthopedic surgeon, for an impartial medical examination.

In an October 30, 2007 report, Dr. Ochoa diagnosed appellant with lumbar discogenic syndrome. He indicated that the residuals of appellant's work incident had not resolved in that appellant was still symptomatic and radiating pain, but noted he was stable. Dr. Ochoa indicated that appellant was unable to return to his occupation as it required a lot of bending, pushing,

¹ Docket No. 99-1907 (issued May 22, 2001).

pulling, lifting, carrying and overreaching, etc. He further noted that appellant was also unable to tolerate a prolonged sitting position and that he could only stand in one position. Dr. Ochoa indicated that appellant had to change his posture frequently because of complaints of pain. He completed a work capacity evaluation indicating that appellant could not perform his usual job, but that he was able to work four hours per day with restrictions. Dr. Ochoa prohibited appellant from twisting, bending/stooping, operating a motor vehicle, squatting, kneeling and climbing. He noted that appellant could only sit, walk and stand for 10 minutes at a time. Dr. Ochoa limited him to pushing, pulling and lifting 10 pounds or less for 10 minutes (upper body only). He required that appellant have breaks lasting 2 to 3 minutes every 30 minutes.

In a November 7, 2007 medical report, Dr. DeHaan indicated that he last saw appellant on July 9, 2007. He noted that the effects of appellant's work injury persist and prevent him from returning to his usual job. Dr. DeHaan further noted that at this point he cannot perform any activities which include walking, standing or prolonged sitting.

On November 13, 2007 the employing establishment offered appellant a position as a clerk. The employing establishment indicated that the position was within the reporting physician's limitations. The employing establishment noted that the position was light duty (primarily sedentary) with no pushing, pulling or lifting over 10 minutes of over 10 pounds. The position would require appellant to provide general office support and assistance.

By letter dated December 4, 2007, the Office found that the above job offer was suitable and was in accordance with the medical limitations provided by Dr. Ochoa in his October 30, 2007 report. It noted that the employing establishment confirmed that the position remained available, and informed appellant that he had 30 days from the date of the letter to accept the position or provide a written explanation of his reason for refusing the position. The Office informed appellant that, if he failed to report for the offered position and failed to demonstrate that his failure to report was justified, his right to compensation and schedule award will be terminated.

Appellant submitted a statement indicating that he declined the job offer noting that his "current medical condition continues to degrade from the original injury." He argued that the position was not within his medical restrictions. Appellant contended that he feared any attempt to fulfill such duties would subject him to increased experiences of pain, unreasonable risk of increased injury/disability, would impair any opportunity to fully heal and would possibly subject him to disciplinary action for inability to complete or attempt duties due to experiencing pain or other physical limitations.

By letter dated January 8, 2008, the Office informed appellant that it considered his reasons for not accepting the position to not be valid. It provided appellant 15 more days to accept the position, and noted that, if he did not accept the position within this time period, his entitlement to wage-loss and schedule award benefits will be terminated.

Appellant submitted a January 7, 2008 report by Dr. DeHaan wherein he indicated that appellant still could not do anything without exacerbations of pain. Dr. DeHaan opined that it would not be advisable for appellant to return to light-duty work, noting that he was taking narcotic medications and could put himself and/or other people at harm due to this.

By decision dated January 24, 2008, the Office terminated appellant's wage-loss and schedule award compensation due to his failure to accept suitable work effective February 17, 2008.

On December 12, 2008 appellant requested reconsideration. Evidence submitted after the January 24, 2008 decision included, *inter alia*, reports from Dr. Thomas A. Hunley, a Board-certified anesthesiologist, indicating that he gave appellant repeated epidural steroid injections for treatment of his low back pain, including injections on March 26 and 31, April 10 and October 8, 2008. Appellant also saw Dr. DeHaan on May 7 and September 15, 2008. In his September 15, 2008 report, Dr. DeHaan noted treatment for follow up on his chronic lower back pain with lumbar degenerative arthritis and degenerative disc disease. He noted no change in his symptoms or status. Appellant also submitted numerous documents that had been in evidence before the January 24, 2008 decision.

By decision dated March 23, 2009, the Office denied modification of its prior decision.

LEGAL PRECEDENT

Section 8106(c) 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.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 a refusal to accept such employment.⁵ In determining what constitutes suitable work for a particular disabled employee, it considers 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

² 5 U.S.C. § 8106(c)(2).

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, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5.a(1) (July 1997); *see Lorraine C. Hall*, 51 ECAB 477 (2000).

employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.⁸

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.⁹ It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.¹⁰

Section 8123(a) 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.¹¹ When the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.¹²

ANALYSIS

The Office accepted appellant's claim for sprain of the back lumbar region, degeneration of lumbar or lumbosacral intervertebral disc and displacement of lumbar intervertebral disc without myelopathy as a result of the accepted work incident. The second opinion physician, Dr. Holladay, opined that appellant could return to work for four hours a day with restrictions that included pushing/pulling 10 pounds for one hour a day, walking two hours a day and standing for one hour a day. He noted that appellant could perform a sedentary job and could sit for four hours. Appellant's treating physician, Dr. DeHaan disagreed, and indicated that appellant had more severe limitations, including working only 1 to 2 hours a day, sitting limited to 1 hour at a time, walking limited to 100 to 200 yards at a time and standing to 5 to 10 minutes at a time. Due to the difference in medical opinion between appellant's treating physician and the second opinion physician with regard to appellant's limitations, the Office properly referred appellant for an impartial medical examination. Dr. Ochoa, the impartial medical examiner, found that appellant could return to work four hours a day with restrictions. His work restrictions prohibited appellant from twisting, bending/stooping, operating a motor vehicle, squatting, kneeling and climbing. Dr. Ochoa noted that appellant could only sit, walk and stand 10 minutes at a time. He limited appellant to pushing, pulling and lifting 10 pounds or less for 10 minutes. Dr. Ochoa required appellant to have breaks lasting 2 to 3 minutes every 30 minutes.

On November 27, 2007 the employing establishment offered appellant a position as a clerk. The Office determined that this position was suitable. However, the Board finds that the

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

⁹ *Gayle Harris*, 52 ECAB 319 (2001).

¹⁰ *Richard P. Cortes*, 56 ECAB 200 (2004).

¹¹ 5 U.S.C. § 8123(a); see *Geraldine Foster*, 54 ECAB 435 (2003).

¹² *Manuel Gill*, 52 ECAB 282 (2001).

job description and offer did not sufficiently set forth the physical restrictions for the clerk position. In the November 27, 2007 letter offering the position to appellant, the employing establishment stated that the position was “within the limitations given by the reporting physician.” The employing establishment did not specifically state which physician was the “reporting physician.” It is not clear whether the position is within the restrictions as set forth by Dr. Ochoa. The employing establishment noted that the position was light duty, primarily sedentary, and involved no pushing, pulling and lifting over 10 minutes/pounds. The Board notes that Dr. Ochoa limited appellant to sitting 10 minutes at a time, and 10 minutes of walking and standing at a time. The offered job did not list these restrictions. There is no indication that the prohibitions against twisting, bending/stooping, operating a motor vehicle, squatting, kneeling and climbing were honored. Furthermore, there is no recognition that appellant was to be given 2- to 3-minute breaks every 30 minutes, as required by Dr. Ochoa. The Office did not address how appellant could perform the clerk position in light of these limitations.

The Board finds that the Office did not establish that the clerk position offered by the employing establishment was suitable based on appellant’s restrictions. The Office did not meet its burden of proof to terminate appellant’s compensation benefits effective February 17, 2008.

CONCLUSION

The Board finds that the Office improperly terminated appellant’s compensation benefits effective February 17, 2008 pursuant to 5 U.S.C. § 8106(a).¹³

¹³ Appellant submitted additional evidence after the Office’s March 23, 2009 decision. However the Board cannot consider such evidence for the first time on appeal. The Board’s review of a case shall be limited to the evidence in the case record which was before the Office at the time of its final decision. 20 C.F.R. § 10.501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 23, 2009 is reversed.

Issued: March 15, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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