United States Department of Labor
Employees' Compensation Appeals Board

J.V., Appellant	)	
	)	**Docket No. 09-1604**
and	)	**Issued: May 18, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Bronx, NY, Employer	)	

Appearances:
Appellant, pro se
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 June 8, 2009 appellant filed a timely appeal of the Office of Workers' Compensation Programs' December 15, 2008 merit decision terminating his compensation benefits for refusing an offer of suitable work and May 19, 2009 nonmerit decision denying his request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation benefits, effective December 21, 2008, on the grounds that he refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c); and (2) whether the Branch of Hearings and Review properly denied his request for an oral hearing as untimely filed.

On appeal, appellant contends that he still suffers from mid-back pain. He further contends that he still receives medical treatment for his April 22, 2006 employment injuries.

FACTUAL HISTORY

The Office accepted that on April 22, 2006 appellant, then a 51-year-old mail processing clerk, sustained lumbago and aggravation of muscle spasms while in the performance of his work duties. Appellant stopped work on April 30, 2006. On August 17, 2006 Dr. David Lent, an attending Board-certified orthopedic surgeon, released appellant to return to full-duty work with no restrictions. On November 17, 2006 the Office accepted that he sustained a recurrence of disability on August 21, 2006. Appellant did not return to work.

By letter dated April 17, 2007, the Office referred appellant, together with a statement of accepted facts and the case record to Dr. Richard N. Weinstein, a Board-certified orthopedic surgeon, for a second opinion medical examination of his continuing disability and employment-related residuals. In a May 1, 2007 medical report, Dr. Weinstein reviewed a history of appellant's April 22, 2006 employment injuries and medical treatment. He described a full physical examination which included essentially normal findings related to the cervical and thoracolumbar spines. Dr. Weinstein diagnosed a thoracic sprain without neurologic findings. He opined that appellant had mild partial disability. Dr. Weinstein stated that he may perform light-duty work with restrictions. He advised that there was no need for further orthopedic treatment, physical therapy or independent medical examination or reevaluation. Dr. Weinstein further advised that appellant had no residuals of his April 22, 2006 employment injuries. He did not suffer any additional injuries. There were no objective findings that appellant suffered an aggravation of a prior existing condition or any current disability as a result of the employment injuries. Dr. Weinstein concluded that he had reached maximum medical improvement.

By letter dated June 7, 2007, the Office requested that the employing establishment offer appellant a light-duty position based on Dr. Weinstein's May 1, 2007 findings.

In a September 7, 2007 report, Dr. Thomas T. Lee, an attending Board-certified neurologist, reviewed a history of appellant's April 22, 2006 employment injuries, medical treatment and social and family background. He listed his essentially normal findings on physical and neurological examination and reviewed diagnostic test results. Dr. Lee diagnosed C3-4 and C4-5 disc bulges and secondary paraspinal muscle spasm. He recommended an epidural injection or facet block to treat the diagnosed conditions.

On January 3, 2008 the employing establishment offered appellant a modified mail processing clerk position based on Dr. Weinstein's May 1, 2007 findings. On January 10, 2008 appellant rejected the job offer. He submitted a January 2, 2008 treatment note from Dr. Robert L. Hecht, an attending Board-certified physiatrist, stated that he had tenderness and restricted range of motion in the thoracic spine. Dr. Hecht advised that he remained disabled for work.

On February 6, 2008 the Office found a conflict in the medical opinion evidence between Dr. Lee, Dr. Hecht and Dr. Weinstein as to appellant's need for further medical treatment and whether he had any continuing employment-related residuals or disability. By letter dated March 13, 2008, it referred him to Dr. George Burak, a Board-certified orthopedic surgeon, for an impartial medical examination.

In an April 2, 2008 report, Dr. Burak reviewed a history of appellant's April 22, 2006 employment injuries, medical treatment and employment. He noted his complaints of severe mid and upper back pain. Appellant experienced trouble breathing, using a telephone and lifting with his upper extremities. Dr. Burak listed his findings on physical examination, which included her ability to ambulate without any noted difficulties and toe and heel walk without any noticeable limps or abnormal gait patterns. Regarding the cervical spine, he advised that it was in midline. There was no evidence of paracervical muscle spasm on any movements of the neck. There was full range of motion. The deep tendon reflexes were present and equal bilaterally. There was no evidence of sensory deficits or weakness in the upper extremities. Circumferential measurements of the upper extremities did not demonstrate any evidence of atrophy. Regarding the thoracolumbar spine, Dr. Burak noted appellant's complaint of tenderness on any palpation overlying the mid and upper portion. There was no evidence of spasm. Dr. Burak stated that range of motion was virtually impossible to test due to appellant's complaints of severe back pain. He, however, stated that appellant could sit on the examining table without any difficulties. Straight leg raising was possible to 70 degrees bilaterally both in the sitting and supine positions. Heel to knee tests were within normal limits. Appellant could lie on his back and turnover onto his side and abdomen without any difficulties. Both lower extremities were intact from a neurovascular aspect. There was no evidence of abnormal reflex changes, sensory or motor deficit changes or weakness in the lower extremities. There was no evidence of trophic changes or pedal edema throughout the lower extremities.

Dr. Burak advised that appellant sustained a sprained upper back as a result of the April 22, 2006 employment injury. There were no objective findings to support a finding that the diagnosed condition was still active. There were also no objective findings to support appellant's subjective complaints related to the upper and mid-back region. Dr. Burak stated that he did not sustain any other injuries due to the employment injuries. He advised that appellant most likely continued to have evidence of a mild partial disability of the upper and mid-back regions due to the April 22, 2006 employment injuries. Dr. Burak opined that appellant could return to work with restrictions, which included avoidance of repetitive overhead lifting and lifting no more than 20 pounds. He related that there was no evidence that appellant sustained an aggravation of a preexisting condition due to the April 22, 2006 employment injuries. The only objective findings suggestive of a current employment-related disability were appellant's complaint of considerable pain in the mid and upper back. Dr. Burak stated that palpation over this area produced pain. He opined that appellant was permanently disabled regarding his mid and upper back pain. Due to appellant's psychological preoccupation with his current back pain, Dr. Burak did not believe improvement was a distinct future possibility. He stated that further medical treatment was not necessary since the results of the accepted employment conditions had reached a plateau. In an accompanying work capacity evaluation, Dr. Burak stated that appellant could work eight hours per day with restrictions, which included reaching, twisting, bending and stooping for two hours, no operation of a motor vehicle at work and no lifting more than 10 pounds for two hours per day. He could operate a motor vehicle to and from work as needed. Breaks were not required.

By letter dated May 13, 2008, the Office requested that the employing establishment offer appellant a light-duty position based on Dr. Burak's April 2, 2008 findings.

In a July 24, 2008 report, Dr. Anthony L. Brittis, a Board-certified neurosurgeon and physiatrist, reviewed a history of appellant's April 22, 2006 employment injuries and medical treatment. He provided his essentially normal findings on physical examination with pain in the interscapular area. Dr. Brittis reviewed a December 21, 2006 magnetic resonance imaging (MRI) scan of appellant's cervical spine, which demonstrated disc herniations at C3-4 and C4-5. He stated that it was not uncommon for an appellant to have a herniated disc in the upper part of the cervical spine with referred pain to the interscapular area. Dr. Brittis had never seen a case where there was purulent interscapular pain with no associated neck pain although there was a cervical disc in appellant's case in the upper cervical area. He attempted to review a May 26, 2006 MRI scan of the thoracic spine but, could not see enough details to provide an opinion. Dr. Brittis recommended additional diagnostic testing. He believed that appellant may have sustained a herniated disc or a protrusion of a disc somewhere along the T5, T6 or adjacent levels. Dr. Brittis recommended that work be provided to appellant.

On September 10, 2008 the employing establishment offered appellant a modified mail processing clerk position. The position assignments included manual distribution of letters and flats and sweeping letters and flats from a case. The physical requirements of the position included sitting for two hours with no lifting more than 10 pounds, standing with lifting no more than 10 pounds and reaching no more than two hours. A break was permitted following the lifting and reaching activities.

By letter dated October 22, 2008, the Office notified appellant that the offered position of modified mail processing clerk with the employing establishment was suitable to his work capabilities. It advised him that he had 30 days to either accept the position or provide reasons justifying refusal, otherwise his wage-loss compensation would be terminated.

On November 11, 2008 appellant rejected the offered position based on Dr. Hecht's accompanying October 22, 2008 report. In this report, Dr. Hecht listed his essentially normal findings on examination of appellant's thoracic spine with tenderness and restricted range of motion. He recommended continued physical therapy and pain medication. Dr. Hecht opined that appellant remained totally disabled. In a November 11, 2008 report, he opined that appellant sustained degeneration of the thoracic spine causally related to his April 22, 2006 employment injuries. Dr. Hecht further opined that appellant was totally disabled commencing May 1, 2006.

In an undated note, Dr. Brittis advised that appellant suffered from persistent interscapular pain. He ordered additional diagnostic testing of his thoracic spine. In a November 14, 2008 letter, Dr. Brittis stated that appellant had not been cleared to return to work pending the results of diagnostic testing.

By letter dated November 25, 2008, the Office advised appellant that he had not submitted evidence sufficient to support his refusal to accept the job offer and that he had 15 days to accept the offer or make arrangements to report for employment, otherwise his compensation benefits would be terminated.

In a December 2, 2008 letter, appellant stated that he was being treated by numerous specialty physicians. He took several types of pain medication and underwent physical therapy three times per week. Appellant stated that his pain was still severe and constant. Walking,

sitting, standing and lying down for long periods were unbearable for him. Appellant rejected the offered position because it involved lifting, sitting and standing for hours which would aggravate his condition and jeopardize his health.

On December 11, 2008 the employing establishment advised the Office that the offered position was still available.

By decision dated December 15, 2008, the Office terminated compensation benefits effective December 21, 2008 on the grounds that appellant failed to accept an offer of suitable work. It accorded special weight to Dr. Burak's medical opinion as an impartial medical specialist. On April 16, 2009 appellant requested an oral hearing before an Office hearing representative.

In a May 19, 2009 decision, the Office's Branch of Hearings and Review denied appellant's request for a hearing as it was untimely filed. It further reviewed his request and denied the hearing as it found that the issue of whether he refused an offer of suitable employment could equally well be addressed by requesting reconsideration and submitting new evidence not previously considered.

LEGAL PRECEDENT -- ISSUE 1

Section 8106(c)(2) of the Federal Employees' Compensation Act[1] states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for him is not entitled to compensation.[2] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.[3] In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.[4]

Section 8123(a) of the Act provides that, if there is a 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.[5] The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office

[1] 5 U.S.C. §§ 8101-8193.

[2] *Id.* at § 8106(c).

[3] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

[4] *Glen L. Sinclair*, 36 ECAB 664 (1985).

[5] 5 U.S.C. § 8123(a).

shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[6] Where there exists opposing medical reports of virtually equal weight and rationale and 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 upon a proper factual background, must be given special weight.[7]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained lumbago and aggravation of muscle spasms while in the performance of duty on April 22, 2006. Appellant stopped work on August 21, 2006 and the Office accepted that he sustained a recurrence of disability on that date causally related to his April 22, 2006 employment-related conditions. It subsequently terminated his compensation benefits effective December 21, 2008, finding that he refused an offer of suitable work based on the medical opinion of Dr. Burak, an impartial medical specialist. The initial issue is whether the Office properly determined that the offered position was medically suitable. The issue of whether an employee has the physical ability to perform a modified position is a medical question that must be resolved by probative medical evidence.[8]

The Board notes that a conflict in the medical opinion evidence existed between, Dr. Lee and Dr. Hecht, attending physicians, who opined that appellant remained totally disabled and Dr. Weinstein, an Office referral physician, who opined that appellant had no employment-related residuals or disability and that he could perform light-duty work with restrictions. The Office properly referred appellant to Dr. Burak, selected as the impartial medical specialist.[9]

On April 2, 2008 Dr. Burak reviewed appellant's April 22, 2006 employment injuries and medical treatment. He described a full physical examination of his cervical and thoracolumbar spines and lower extremities and diagnostic testing. Dr. Burak reported appellant's complaints of severe mid and upper back pain. Although he diagnosed a sprained upper back as a result of the April 22, 2006 employment injuries, he found no objective findings to support continuing residuals of the diagnosed condition or appellant's complaints of upper and mid-back region pain. Dr. Burak concluded that there was no evidence of an employment-related aggravation of a preexisting condition, nor that he sustained any injuries other than those accepted by the Office. However, he related appellant's mild partial disability to pain resulting from the accepted employment-related conditions and advised that he was capable of working with restrictions. Dr. Burak provided work restrictions limiting his reaching, twisting, bending, stooping and lifting of no more than 10 pounds to two hours. He stated that appellant could not drive a vehicle at work.

[6] 20 C.F.R. § 10.321.

[7] *David W. Pickett*, 54 ECAB 272 (2002).

[8] *See Gayle Harris*, 52 ECAB 319 (2001).

[9] *See R.H.*, 59 ECAB ___ (Docket No. 07-2124, issued March 7, 2008).

The Board finds that Dr. Burak provided a complete and rationalized opinion, based on an accurate factual and medical background. As such, the physician's opinion, that appellant could return to light-duty work, is accorded special weight due to his status as an impartial medical examiner.[10] Appellant did not submit sufficient medical evidence to establish that he could not return to light-duty work within Dr. Burak's restrictions. Although Dr. Hecht's October 22 and November 11, 2008 reports found that appellant continued to be totally disabled, they did not contain a rationalized opinion stating that his continued total disability was due to his employment injuries.[11] Although Dr. Brittis' opined on November 14, 2008 that appellant had not been cleared to return to work pending the results of diagnostic testing, he did not adequately explain the basis for changing his July 29, 2008 medical opinion that appellant could work. His undated note ordered additional diagnostic testing of appellant's thoracic spine but did not contain a rationalized opinion stating that appellant continued to be totally disabled for work due to his employment injuries.[12] The Board finds, therefore, that Dr. Burak's medical opinion constitutes the special weight of the medical evidence and establishes that appellant is no longer totally disabled for work due to the effects of the employment-related injuries.

The employing establishment offered appellant a light-duty position as a modified mail-processing clerk based on Dr. Burak's April 2, 2008 findings. The physical requirements for the position included sitting up to two hours with no lifting more than 10 pounds, standing with lifting no more than 10 pounds and reaching up to two hours. A break was permitted following the lifting and reaching activities. The Board finds that the physical requirements of the offered modified mail processing clerk position fall within appellant's work restrictions. The weight of the medical evidence establishes that he was no longer totally disabled from work and has the physical capacity to perform the duties listed in the September 10, 2008 job offer. The Board notes that there is no dispute that the offered position is vocationally suitable.

In accord with the procedural requirements of 5 U.S.C. § 8106(c), the Office advised appellant on October 22, 2008 that it found the job to be suitable and gave him an opportunity to provide reasons for refusing the position within 30 days. After reviewing the medical evidence from Dr. Brittis and Dr. Hecht, the Office, in a November 25, 2008 letter, advised appellant that the evidence submitted was insufficient to support his refusal to accept the job offer and provided him an additional 15 days to accept the position without penalty. He did not submit any additional medical evidence, but rather merely argued his inability to perform the duties of the offered position.[13] The Board finds that the Office followed established procedures prior to the termination of compensation pursuant to section 8106(c) of the Act.

[10] *See L.W.*, 59 ECAB ___ (Docket No. 07-1346, issued April 23, 2008).

[11] *Id.*

[12] *See Jaja K. Asaramo*, 55 ECAB 200 (2004).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity* 2.814.5(a)(3) (October 2005) (acceptable reasons for refusing to accept suitable employment include medical evidence establishing that a claimant is disabled due to a worsening of an accepted condition). Appellant's dislike for the position offered is not an acceptable reason for refusal of the position offered. *Id.* at Chapter 2.814.5.c.

The Board finds that the position offered was medically and vocationally suitable and the Office complied with the procedural requirements of section 8106(c) of the Act. The Office met its burden of proof to terminate appellant's compensation benefits.

Appellant's contention on appeal that he cannot perform the duties of the offered position due to continuing mid-back pain and medical treatment for his pain has not been established. As stated, Dr. Burak whose rationalized opinion is entitled to special weight as an impartial medical specialist found no objective evidence to support a finding that appellant had any continuing residuals of his employment-related upper and mid-back condition rendering him incapable of working. He also found that appellant did not require further medical treatment as his employment-related conditions had reached a plateau.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of the Office's final decision.[14] A claimant is not entitled to a hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark or other carrier's date marking[15] and before the claimant has requested reconsideration.[16] However, when the request is not timely filed or when reconsideration has previously been requested, the Office may within its discretion grant a hearing or review of the written record and must exercise this discretion.[17]

ANALYSIS -- ISSUE 2

Appellant's request for an oral hearing was dated April 16, 2009, more than 30 days after the Office's December 15, 2008 decision. The Board finds, therefore, his request for an oral hearing was not timely and he was not entitled to a hearing as a matter of right. The Branch of Hearings and Review exercised its discretion in denying appellant's request for an oral hearing by finding that he could request reconsideration and submit evidence not previously considered, which established that he did not refuse an offer of suitable employment. The Board finds that the Branch of Hearings and Review did not abuse its discretionary authority in denying appellant's request for a hearing.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation benefits, effective December 21, 2008, on the grounds that he refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c). The Board further finds that the Branch of Hearings and Review properly denied his request for an oral hearing as untimely filed.

[14] 5 U.S.C. § 8124(b)(1).

[15] 20 C.F.R. § 10.616(a); *Tammy J. Kenow*, 44 ECAB 619 (1993).

[16] *Martha A. McConnell*, 50 ECAB 129, 130 (1998).

[17] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the May 19, 2009 and December 15, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 18, 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