United States Department of Labor
Employees' Compensation Appeals Board

M.C., Appellant	)	
and	)	**Docket No. 09-1889**
	)	**Issued: May 4, 2010**
DEPARTMENT OF THE ARMY, INSTALLATION MANAGEMENT AGENCY, Fort Buchanan, Puerto Rico, Employer	)	

Appearances:
Appellant, pro se
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 July 20, 2009 appellant filed a timely appeal from the January 22, 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 February 15, 2009 on the grounds that he refused an offer of suitable work.

FACTUAL HISTORY

The Office accepted that on August 24, 2001 appellant, then a 50-year-old maintenance mechanic, sustained a lumbosacral strain when he slipped off a bench at work.[1] He stopped work for various periods and received appropriate compensation from the Office.

[1] Appellant's supervisor indicated that appellant's temporary position would have ended on September 28, 2001.

Appellant received periodic medical treatment from several attending physicians. Diagnostic testing from late 2001 and early 2002 showed that he had degenerative disc disease of the lumbar spine, small disc herniation at L5-S1 and left arm radiculopathy emanating from L5-S1. In November 2002, the Office referred appellant to Dr. Francisco J. Carlos, a Board-certified orthopedic surgeon, for further evaluation. On November 21, 2002 Dr. Carlos determined that appellant continued to have partial disability due to the August 24, 2001 work injury.

Appellant received medical treatment from Dr. Maria I. Palou, an attending Board-certified physiatrist. On April 27, 2004 Dr. Palou indicated that his condition was complicated by the fact that diagnostic testing of his cervical spine showed degenerative disc disease and mild stenosis at C2-3 and C3-4. In brief reports dated April 25, 2005 and May 25, 2006, Dr. Palou continued to treat appellant for low back and neck problems.

In an April 25, 2007 report, Dr. Palou stated that after his August 24, 2001 injury appellant was found to have a herniated disc a L5-S1, left S1 radiculopathy and peripheral polyneuropathy. Pain started to radiate to appellant's neck area and hands in 2003 with several episodes of neck stiffness and he was found to have cervical osteoarthritis and canal stenosis at the C2-3 and C3-4 levels. Dr. Palou indicated that examination showed that he had severe muscle spasm in his lumbar, dorsal and cervical spines, stiffness, 4/5 muscle strength and hand grip of four pounds per square inch. She indicated that appellant's neck, back and depression conditions were work related and stated that he continued to be totally disabled from all work.[2]

In an April 24, 2008 report, Dr. Palou described appellant's medical history and stated that when she examined him on April 21, 2008 he had muscle spasms in his lumbar, dorsal and cervical areas with tenderness, worse at the left lumbar area.[3] Mobility of appellant's spine and muscle strength were reduced. Dr. Palou indicated that all of his physical conditions were related to his work injury and found that he was still disabled with an inability to lift, carry, pull or push and limited capacity for static or repetitive movements. In an April 23, 2008 form report, she stated that appellant could not perform work because he had cervical canal stenosis and a lumbar herniated nucleus pulposus with chronic pain that did not allow him to perform repetitive movements, assume static positions or engage in lifting, carrying, pushing or pulling. Dr. Palou indicated that he could sit or walk for 20 minutes and stand for 15 minutes but could not perform any other activities.

In May 2008, the Office referred appellant to Dr. Fernando Rojas, a Board-certified orthopedic surgeon, for further evaluation. On July 11, 2008 Dr. Rojas described appellant's factual and medical history, including the findings of diagnostic testing and the course of his medical treatment since his August 24, 2001 work injury. He noted that appellant complained of intermittent left leg weakness and pain which radiated down the left leg. Dr. Rojas observed that appellant walked with no limp and that he was able to get onto the examining table with ease. On examination appellant had loss of lower back lordosis and there was hardening of the

[2] In an April 25, 2007 report, Dr. Palou stated that appellant's chronic pain prevented him from performing any work. She indicated that appellant could sit, stand or walk for 15 minutes but could not perform any other activities.

[3] Dr. Palou also indicated that recently appellant had developed allergic rhinitis, pharyngitis, sleep apnea, bronchial asthma and right bundle branch block.

paraspinal muscles on both sides upon palpation. Range of motion of the back included flexion of 15 degrees, extension of 0 degrees and lateral bending of 20 degrees to each side. Dr. Rojas noted that there were no sensory or motor deficits. Appellant's patellar reflex was +2 on the right and +1 on the left; ankle reflex was +2 on the right and +1 on the left.

Dr. Rojas further stated that appellant had a lumbosacral sprain with discogenic disease and a herniated disc at LS-Sl to the left. Appellant's condition had not resolved completely but the physical examination and diagnostic testing showed that he remained in a stable situation where his pain was controlled with decreased activity and medications. Dr. Rojas stated that appellant had reached maximum medical improvement and was not capable of returning to his regular maintenance mechanic job since it would require him to bend, stoop and to lift heavy machinery. However, appellant was able to perform work within certain work restrictions. In a July 30, 2008 work restrictions form, Dr. Rojas advised that appellant could work eight hours a day. He could engage in sitting or standing for up to four hours per day, walking for up to two hours, repetitive wrist or elbow movement for up to eight hours and lifting, pushing or pulling up to 20 pounds. Appellant could not engage in such activities as reaching, twisting, bending, stooping, squatting or kneeling.

On September 30, 2008 the employing establishment offered appellant a job as a modified maintenance mechanic.[4] The position involved performing preventative maintenance in office buildings, warehouses and other properties through such activities as installing and/or maintaining wiring systems, switches, wall outlets, fuses, plugs, faucets, showerheads, doors, sinks and dishwashers. The job might also include such activities as unstopping clogged drains with snakes, cleaning and flushing grease traps, tightening screws and fittings and adjusting and repairing range burner controls and thermostats. The physical requirements included sitting or standing for up to four hours per day, walking for up to two hours, repetitive wrist or elbow movement for up to eight hours and lifting, pushing or pulling up to 20 pounds.

In a November 20, 2008 letter, the Office advised appellant of its determination that the position offered by the employing establishment was suitable. It informed him 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.

In a November 7, 2008 letter, appellant contended that he was not physically or mentally capable of returning to work.[5]

In a December 1, 2008 letter, the Office advised appellant that his reasons for not accepting the position were unjustified. It advised him that his compensation would be terminated if he did not accept the position within 15 days of the date of the letter.

[4] The position was temporary, not to exceed 90 days.

[5] Appellant had not explicitly accepted or refused the offered position prior to this time.

In a January 22, 2009 decision, the Office terminated appellant's compensation effective February 15, 2009 on the grounds that he refused an offer of suitable work. It indicated that the opinion of Dr. Rojas showed that appellant could perform the offered position and that the opinion of Dr. Palou did not contain adequate medical rationale.

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."[6] However, to justify such termination, the Office must show that the work offered was suitable.[7] 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.[8] A temporary job will be considered unsuitable unless the claimant was a temporary employee when injured and the temporary job reasonably represents the claimant's wage-earning capacity. Even if these conditions are met, a job which will terminate in less than 90 days will be considered unsuitable.[9]

Section 8123(a) of the Act provides in pertinent part: "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."[10] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[11] In situations where there exist 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.[12]

ANALYSIS

The Office accepted that on August 24, 2001 appellant sustained a lumbosacral strain when he slipped off a bench at work. Appellant was working as a maintenance mechanic at the time, a temporary position that was set to end on September 28, 2001. In a January 22, 2009 decision, the Office terminated his compensation effective February 15, 2009 on the grounds that he refused an offer of suitable work.

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[6] 5 U.S.C. § 8106(c)(2).

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

[8] 20 C.F.R. § 10.517; *see Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

[9] *See* Federal (FECA) Procedure Manual, Part 2 -- Claim, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4b (July 1997).

[10] 5 U.S.C. § 8123(a).

[11] *William C. Bush*, 40 ECAB 1064, 1975 (1989).

[12] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

In September 2008, the employing establishment offered appellant a job as modified maintenance mechanic.[13] The position involved performing preventative maintenance in office buildings, warehouses and other properties through such activities as installing and/or maintaining wiring systems, switches, wall outlets, fuses, plugs, faucets, showerheads, doors, sinks and dishwashers.[14] The physical requirements included sitting or standing for up to four hours per day, walking for up to two hours, repetitive wrist or elbow movement for up to eight hours and lifting, pushing or pulling up to 20 pounds.

In determining that appellant was physically capable of performing the modified maintenance mechanic position, the Office relied on the opinion of Dr. Rojas, a Board-certified orthopedic surgeon who served as an Office referral physician. On July 11, 2008 Dr. Rojas indicated that on examination appellant had loss of lower back lordosis and there was hardening of the paraspinal muscles on both sides upon palpation. Range of motion of the back included flexion of 15 degrees, extension of 0 degrees and lateral bending of 20 degrees to each side. Dr. Rojas stated that appellant had a lumbosacral sprain with discogenic disease and a herniated disc at L5-Sl to the left. He found that appellant's condition had not resolved completely but noted that the physical examination and diagnostic testing showed that he remained in a stable situation where his pain was controlled with decreased activity and medications. Dr. Rojas concluded that appellant was able to perform work within certain work restrictions. In a July 30, 2008 work restrictions form, he advised that appellant could work eight hours a day. Appellant could engage in sitting or standing for up to four hours per day, walking for up to two hours, repetitive wrist or elbow movement for up to eight hours and lifting, pushing or pulling up to 20 pounds. He could not engage in such activities as reaching, twisting, bending, stooping, squatting or kneeling.

The Board finds that Dr. Rojas' opinion regarding appellant's ability to perform the offered maintenance mechanic position conflicts with that of Dr. Palou, an attending Board-certified physiatrist. In contrast to Dr. Rojas' opinion, Dr. Palou found in April 23 and 24, 2008 reports that appellant was totally disabled from work. She stated that appellant could not perform work because he had cervical canal stenosis and a lumbar herniated nucleus pulposus with chronic pain that did not allow him to perform repetitive movements, assume static positions or engage in lifting, carrying, pushing or pulling.[15] Dr. Palou indicated that he could sit or walk for 20 minutes and stand for 15 minutes but could not perform any other activities listed on a work restrictions form. She noted that when she examined appellant on April 21, 2008 he had muscle spasms in his lumbar, dorsal and cervical areas with tenderness, worse at the left lumbar area. Dr. Palou also indicated that the mobility of his spine and his muscle strength were reduced.

[13] Although the modified mechanic position was temporary in nature, this was permissible as appellant's date-of-injury job was temporary and the modified mechanic position would not expire in less than 90 days. *See supra* note 9.

[14] The job might also include such activities as unstopping clogged drains with snakes, cleaning and flushing grease traps, tightening screws and fittings and adjusting and repairing range burner controls and thermostats.

[15] It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitable work. *See Richard P. Cortes*, 56 ECAB 200 (2004).

The Board finds that, because a continuing conflict exists in the medical evidence regarding appellant's ability to perform the offered maintenance mechanic position, the Office did not meet its burden of proof to show that the offered position was suitable. For these reasons, the Office improperly terminated his compensation effective February 15, 2009 on the grounds that he refused an offer of suitable work.

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation effective February 15, 2009 on the grounds that he refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the January 22, 2009 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 4, 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