United States Department of Labor
Employees' Compensation Appeals Board

P.S., Appellant	)	
and	)	**Docket No. 10-443**
	)	**Issued: November 19, 2010**
DEPARTMENT OF THE ARMY, INSTALLATION MANAGEMENT AGENCY, Fort Dix, NJ, Employer	)	

Appearances:
Thomas R. Uliase, 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 December 7, 2009 appellant filed a timely appeal from the August 25 and September 30, 2009 merit decisions of the Office of Workers' Compensation Programs terminating his compensation and denying his claim for a schedule. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation effective May 31, 2008 on the grounds that he abandoned suitable work; and (2) whether appellant is entitled to a schedule award.

FACTUAL HISTORY

The Office accepted that on January 3, 2005 appellant, then a 59-year-old fuel distribution system worker, sustained a medial meniscus tear of his right knee when he stepped in a gopher hole at work. He stopped work on March 2, 2005 and underwent a partial medial meniscectomy with joint debridement of the right knee on March 14, 2005. On March 26, 2005

appellant underwent arthroscopic debridement and lavage. The Office paid wage-loss and medical compensation.

In a February 2, 2006 report, Dr. Ronald M. Krasnick, an attending Board-certified orthopedic surgeon, stated that appellant exhibited an antalgic gait, a varus deformity on the right, a thick right knee synovium and 95 degrees of right knee flexion. He advised that appellant had end-stage tricompartmental arthritis and that the treatment of choice was a total knee arthroplasty. Dr. Krasnick recommended that appellant consult with Dr. Robert Booth, a Board-certified orthopedic surgeon, before any decision was made. On September 14, 2006 Dr. Zohar Stark, a Board-certified orthopedic surgeon serving as an Office referral physician, noted that examination of appellant revealed diffuse swelling and tenderness in his right knee. He determined that appellant had ongoing residuals of the accepted work injury which might necessitate surgery. Dr. Stark completed a Form OWCP-5 indicating that appellant was capable of returning to work with restrictions.[1] Based on the report of Dr. Stark, appellant was referred for vocational rehabilitation services.

In a January 23, 2007 report, Dr. Krasnick stated that appellant had chronic degenerative disc disease and spondylosis in his lumbosacral spine and severe tricompartmental degenerative arthritis in his right knee. Appellant remained totally disabled from work and was a candidate for a synvisc injection or a total knee arthroplasty. On June 11, 2007 Dr. Booth examined appellant and diagnosed degenerative arthritis of his right knee. He encouraged appellant not to have a total knee arthropathy due to his youth, right leg sciatica and "his multiple confounding issues." Dr. Booth was asked to complete an OWCP-5 form indicating appellant's work restrictions. In a June 20, 2007 letter, he indicated that he was returning the form uncompleted as he felt appellant should be evaluated by a physician with expertise in determining work limitations.

The Office determined that there was a conflict in medical opinion between Dr. Krasnick and Dr. Stark regarding appellant's ability to work. It referred appellant to Dr. Gregory S. Maslow, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

On September 11, 2007 Dr. Maslow reviewed appellant's factual and medical history and reported the findings on examination of appellant. Appellant had patellofemoral crepitus in his right knee but none in his left and there was no patellofemoral compression pain on either side. The left knee showed 0 to 125 degrees of flexion and the right knee showed 0 to 125 degrees of flexion with pain. Dr. Maslow stated that there was no medial, lateral or drawer instability in either knee and that there was diffuse mild tenderness in the anterior of the right knee. There was no popliteal tenderness on either side and no leg length discrepancy. The neurologic examination of the lower extremities showed that reflexes were intact and there was no sensory deficit to light touch in either lower extremity. Dr. Maslow stated that on January 3, 2005 appellant sustained a sprain of his right knee with aggravation of preexisting degenerative changes and a tear of the medial meniscus. As a result of surgery undertaken for this diagnosis, appellant also suffered pulmonary emboli and a staphylococcus infection of his right knee. Dr. Maslow noted limited findings for appellant's neck, trunk and upper extremities. He noted that appellant exhibited mild evidence of impairment during the clinical evaluation. Appellant's

[1] Dr. Stark stated that appellant could lift, push and pull up to 20 pounds for up to eight hours per day, sit for up to eight hours per day, walk for up to one hour per day and stand for up to one hour per day.

use of a cane was deemed to be optional, but it would be appropriate to use it with his left hand. Dr. Maslow stated that appellant was not totally disabled and "certainly could manage a light-duty or sedentary-type job."

Dr. Maslow completed a Form OWCP-5 indicating that appellant was capable of returning to work on a full-time basis with restrictions. He found that appellant could walk for one to two hours per day; stand for one to two hours per day; operate a motor vehicle at work; and operate a motor vehicle to and from work for short distances. Appellant could lift, push and pull up to 25 pounds but he could not engage in squatting, kneeling or climbing.

In a November 15, 2007 report, Dr. Krasnick diagnosed spondylolisthesis at L5-S1 and degenerative disc disease at L5-S1 and indicated that appellant was totally disabled.

On March 3, 2008 the employing establishment offered appellant a modified job as a supply clerk. This position was sedentary in nature and did not require him to squat, kneel or climb. While sitting in a chair, appellant would be required to perform such duties as issuing and receiving supplies, preparing and submitting transaction documents, monitoring contracts and providing administrative support to property book office operations. He would be allowed to sit or stand at his convenience for comfort and would be permitted to take occasional walks. The supply clerk position required walking for one to two hours a day; standing for one to two hours a day and lifting, pushing and pulling up to 25 pounds.[2] On March 15, 2008 appellant indicated that he could neither accept nor reject the offered position but would contact his physician to discuss whether it was suitable.

In a March 28, 2008 letter, the Office advised appellant of its determination that the supply clerk position offered by the employing establishment was suitable. It informed him that his compensation would be terminated, under 5 U.S.C. § 8106(c)(2), 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 report of Dr. Krasnick, received by the Office on April 7, 2008, he advised that appellant's physical examination was unchanged. He reviewed the supply clerk position offered by the employing establishment and asserted that prolonged sitting was inconsistent with appellant's physical capabilities. Dr. Krasnick reiterated that appellant was totally disabled.

In an April 29, 2008 letter, the Office advised appellant that his reasons for not accepting the position offered by the employing establishment were unjustified. It advised him that his compensation would be terminated, under 5 U.S.C. § 8106(c)(2), if he did not accept the position within 15 days of the date of the letter.

In an April 29, 2008 report, Dr. Krasnick stated that appellant had become progressively immobilized based on a clinical diagnosis of depression. He noted that appellant had a sluggish gait, severe crepitus, varus deformities and marked restriction of motion and indicated that he was totally disabled.

[2] The job description indicated that all duties would be in accordance with the restrictions recommended by Dr. Maslow.

Appellant accepted the job offer on May 14, 2008 and returned to work on May 25, 2008. However, on May 31, 2008 he stopped work and elected to retire from the employing establishment.

In an October 13, 2008 report, Dr. Krasnick stated that appellant reported that he could not sit or stand still. He diagnosed severe arthrosis of the right knee, mild arthrosis of the left knee, degenerative disc disease of the lumbosacral spine, cervical disc disease and severe depressive reaction since the passing of his spouse in January 2008. Dr. Krasnick stated that all of these diagnosed conditions contributed to appellant being totally and permanently disabled.

In an October 28, 2008 letter, the Office advised appellant that it had received notice that he had abandoned the position of supply clerk. It reiterated that the position was suitable, informed him of the provisions of 5 U.S.C. § 8106(c)(2) with respect to refusal of suitable work, indicated that the position remained available and afforded him 30 days to either accept the position or provide an explanation justifying his refusal. Appellant submitted a November 11, 2008 report in which Dr. Krasnick described giving him an injection in his right knee. He did not provide any indication that he would return to work as a supply clerk.[3]

In a December 5, 2008 decision, the Office terminated appellant's compensation benefits effective May 31, 2008 under 5 U.S.C. § 8106(c)(2) on the basis that he abandoned suitable work and neglected to work after suitable employment was offered. It found that the opinion of Dr. Maslow established that he could perform the supply clerk position.

In a November 25, 2008 report, Dr. Krasnick stated that appellant presented to his office with back and bilateral knee pain and noted that he could barely move. He indicated that appellant was severely depressed and that he was about to become under the care of a mental health professional. Appellant's difficulty in walking, sitting and standing made him permanently impaired and totally disabled. On February 24, 2009 Dr. Krasnick stated that appellant was "stable with reference to both of his knees" and had tricompartmental arthrosis in his knees. He noted, "At some point joint replacement surgery will be the treatment of choice."

Appellant filed a schedule award claim due to his January 3, 2005 work injury. In a March 16, 2009 decision, the Office denied his claim, finding that the termination of his monetary compensation under 5 U.S.C. § 8106(c)(2) served as a bar to receipt of schedule award compensation. It also found that appellant had not submitted medical evidence to establish permanent impairment and that he had not yet reached maximum medical improvement.

In an April 7, 2009 report, Dr. Krasnick stated that at some point joint replacement surgery in appellant's knees would be the treatment of choice. He noted, "[Appellant] has reached maximum medical improvement in a sense that nonsurgical management has gone as far as it basically can…. Ultimately [appellant] should be considered at maximum medical improvement after he has recuperated from his joint replacement surgery. Needless to say that would be at some point in the future."

Appellant requested a hearing before an Office hearing representative. At the May 18, 2009 hearing, he testified regarding his medical conditions, including nonwork conditions such

[3] The Office confirmed that the position remained available.

as prostate cancer and back problems. Shortly before appellant received the job offer, his wife died and he became very depressed. He noted that his attending physician put him on depression medication and he began attending clinics with Vietnam Veterans who were dealing with similar problems. When appellant went back to work he had problems getting from his truck to the job and he was not comfortable either sitting or standing. He reported that he had increased pain and swelling in his knee and that he was taking a narcotic medication and was in a daze most of the time. Counsel contended that appellant did not abandon the job but simply could not continue to perform the duties due to a worsening of his symptoms. He noted that the position was against the orders of appellant's physician and asserted that appellant put forward his best effort to perform the job.

In a June 23, 2009 letter, John C. Hollis, a management official, provided comments on the hearing transcript on behalf of the employer. He submitted affidavits from Donna Warren and Darlene Hemmingway, management officials.

In an undated statement, Ms. Warren, a supervisor, stated that on May 25, 2008 appellant was assigned to her section. She noted that his job was essentially an administrative desk job that did not require him to do any notable standing or lifting. Ms. Warren stated that, by lunch time on his first day back to work, appellant requested official time off to go to the civilian personnel office so that he could initiate paperwork to retire from federal service. Appellant did not offer any reason for not wanting to work at his new position, did not state that the working conditions were causing him any pain, discomfort or difficulties, and did not show any outward signs of pain, discomfort or difficulties. After he announced his plan to retire, he spent the better part of the next four days at the civilian personnel office completing paperwork. Appellant never actually performed any substantive duties prior to stopping work on May 31, 2008.

In an undated statement, Ms. Hemmingway, a human resources specialist, stated that on May 25, 2008 appellant came to her office to obtain paperwork for a voluntary regular (nondisability) retirement. She provided him with the proper forms and answered his questions over the next several days. Ms. Hemingway indicated that appellant never stated that the working conditions in his new job were causing him any pain, discomfort or difficulties. Appellant's application for retirement was approved with an effective date of May 31, 2008.

In an August 1, 2009 letter, appellant responded to the employing establishment's comments. He submitted additional reports from Dr. Krasnick describing his medical condition.

In an August 25, 2009 decision, an Office hearing representative affirmed the December 5, 2008 decision terminating appellant's compensation for abandonment of suitable work. Appellant requested a review of the written record by an Office hearing representative with respect to the denial of his schedule award claim. In a September 30, 2009 decision, another Office hearing representative affirmed the March 16, 2009 decision schedule award denial.

LEGAL PRECEDENT -- ISSUE 1

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]

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."[7] 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.[8]

ANALYSIS -- ISSUE 1

The Office accepted that on January 3, 2005 appellant sustained a medial meniscus tear of his right knee when he stepped in a gopher hole at work and the Office paid him compensation for periods of disability. On March 3, 2008 the employing establishment offered appellant a modified job as a supply clerk. This position was sedentary in nature and involved various clerical duties related to issuing and receiving supplies. The supply clerk position required walking for one to two hours per day, standing for one to two hours per day and lifting, pushing and pulling up to 25 pounds, but it did not require squatting, kneeling or climbing. Appellant returned to work in the supply clerk position on May 25, 2008 but stopped work on May 31, 2008. The Office terminated his compensation benefits effective May 31, 2008 for neglecting to work after suitable work was offered. It found that the opinion of Dr. Maslow, a Board-certified orthopedic surgeon serving as an impartial medical specialist, showed that appellant could perform the supply clerk position.

The Board finds that the opinion of Dr. Maslow shows that appellant was capable of performing the supply clerk position offered by the employing establishment in March 2008 and determined to be suitable by the Office. The record does not reveal that the supply clerk position was temporary or seasonal in nature.[9]

The Office properly determined that there was a conflict in the medical opinion between Dr. Krasnick, an attending Board-certified orthopedic surgeon, and Dr. Stark, a Board-certified orthopedic surgeon acting as an Office referral physician, on the issue of appellant's ability 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. § 10.124; *see Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

[7] 5 U.S.C. § 8123(a).

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

[9] *See* Federal (FECA) Procedure Manual, Part 2 -- Claim, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4b (July 1997). The record does not indicate that appellant was not vocationally able to perform the duties of the supply clerk position.

work.[10] In order to resolve the conflict, it properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Maslow.[11] The Board finds that the weight of the medical evidence regarding appellant's ability to work is represented by the thorough, well-rationalized opinion of Dr. Maslow.[12]

On September 11, 2007 Dr. Maslow provided a description of appellant's factual and medical history and reported the findings of his examination of appellant. He indicated that appellant had patellofemoral crepitus in his right knee but none in his left and noted that there was no patellofemoral compression pain on either side. Dr. Maslow stated that there was no medial, lateral or drawer instability in either knee and that there was diffuse mild tenderness in the anterior of the right knee. The neurologic examination of the lower extremities was normal and range of motion of the knees was normal with some pain. Dr. Maslow also reported physical examination findings for appellant's neck, trunk and upper extremities, but he noted limited findings in these areas. He concluded that appellant could perform sedentary work.[13] Dr. Maslow completed a Form OWCP-5 indicating that appellant could work for eight hours per day; walk for one to two hours per day; stand for one to two hours per day; operate a motor vehicle at work; and operate a motor vehicle to and from work for short distances. Appellant could lift, push and pull up to 25 pounds but he could not engage in squatting, kneeling or climbing.

The Board has carefully reviewed the opinion of Dr. Maslow and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Maslow provided a thorough factual and medical history and accurately summarized the relevant medical evidence.[14] He provided medical rationale for his opinion that appellant could perform limited-duty work by noting that appellant exhibited mild evidence of impairment during the clinical evaluation. The Board further finds that the work restrictions recommended by Dr. Maslow are within the specific job requirements of the supply clerk position offered by the employing establishment.

On appeal counsel argued that the sitting requirements of the supply clerk position rendered the position unsuitable given appellant's medical condition. However, Dr. Maslow did not place any restrictions on appellant's ability to sit and the supply clerk position allowed appellant to sit or stand at his convenience for comfort and to take occasional walks as needed. Counsel also argued that Dr. Maslow's opinion did not adequately specify whether appellant would have the ability to drive to and from work.[15] The distance from appellant's home to the work site at Fort Dix is only about 18 miles and there is no evidence that public transportation

[10] On September 14, 2006 Dr. Stark indicated that appellant was capable of returning to work with restrictions. In contrast, Dr. Krasnick stated that on January 23, 2007 appellant was totally disabled from work.

[11] *See supra* note 7 and accompanying text.

[12] *See supra* note 8 and accompanying text.

[13] Dr. Maslow stated that appellant's use of a cane was deemed to be optional, but it would be appropriate to use it in his left hand.

[14] *See Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

[15] Dr. Maslow indicated that appellant could drive to and from work for "short distances."

was not available to Fort Dix. Counsel also argued that Dr. Maslow did not consider various aspects of appellant's medical condition, including prostrate cancer, depression and back problems. Although appellant's history of prostrate cancer is mentioned in several reports, there is no medical evidence of record indicating that this condition impacted his ability to work. Dr. Krasnick stated in several reports that depression contributed to appellant's ability to work. However, he does not specialize in psychiatric medicine and the record does not contain any medical report from an appropriate medical specialist regarding appellant's psychiatric condition, let alone a rationalized medical report showing that appellant had a psychiatric condition limiting his ability to work. With respect to appellant's back condition, there is no evidence that Dr. Maslow did not take into account his back symptoms when rendering his opinion on work restrictions.

For these reasons, the opinion of Dr. Maslow shows that the supply clerk position was suitable. As noted above, 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.[16] The Board has carefully reviewed the evidence and argument submitted by appellant in support of his neglecting to work in the supply clerk position and finds that he has not justified his abandonment of the position.[17] For these reasons, the Office properly terminated appellant's compensation effective May 31, 2008 on the grounds that he abandoned suitable work.[18]

LEGAL PRECEDENT -- ISSUE 2

Section 8106(c)(2) of the Act provides in pertinent part, "A partially disabled employee who ... refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[19] The Board has held that termination under section 8106(c) of the Act serves as a bar to receipt of further compensation, including schedule award compensation.[20]

ANALYSIS -- ISSUE 2

The Office denied appellant's claim for a schedule award noting that the termination of his compensation under 5 U.S.C. § 8106(c)(2) served as a bar to receipt of schedule award compensation. For the reasons discussed above, it terminated appellant's compensation effective May 31, 2008 on the grounds that he abandoned suitable work. This termination provided a

[16] *See supra* note 6.

[17] After the termination of his compensation, appellant submitted reports in which Dr. Krasnick reiterated that he was totally disabled from all work. Dr. Krasnick repeated his earlier assertions that appellant's leg and back symptoms rendered him unable to work, but he did not provide any additional medical rationale in support of this opinion.

[18] The Board notes that the Office complied with its procedural requirements prior to terminating appellant's compensation, including providing appellant with an opportunity to accept the supply clerk position after informing him that his reasons for initially refusing the position were not valid; *see Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).

[19] 5 U.S.C. § 8106(c)(2).

[20] *See Pete F. Dorso*, 52 ECAB 424 (2001).

proper basis for the Office to determine that appellant was not entitled to receive schedule award compensation.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation effective May 31, 2008 on the grounds that he abandoned suitable work. The Board further finds that he is not entitled to a schedule award based on the suitable work termination.

ORDER

IT IS HEREBY ORDERED THAT the September 30 and August 25, 2009 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 19, 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