United States Department of Labor
Employees' Compensation Appeals Board

B.R., Appellant	)	
and	)	**Docket No. 10-306**
	)	**Issued: October 19, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Richmond, TX, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 13, 2009 appellant filed a timely appeal from an October 7, 2009 merit decision of the Office of Workers' Compensation Programs which terminated his entitlement to monetary compensation benefits on the grounds that he had refused an offer of suitable employment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether the Office properly terminated appellant's entitlement to monetary compensation benefits effective October 25, 2009 on the grounds that he refused an offer of suitable work.

FACTUAL HISTORY

On August 8, 2008 appellant, then a 51-year-old letter carrier, injured his low back while reaching over with his left hand to secure a tray he was pulling with his right hand. He stopped work that day. On August 21, 2008 appellant accepted a limited-duty job offer and worked until October 6, 2008 when he stopped work again. He did not return to work. The Office accepted

the claim for lumbar sprain and displacement of a lumbar intervertebral disc. Appellant was placed on the periodic compensation rolls for total disability effective January 18, 2009.

Appellant was treated by Dr. Earl J. Clement, II, a Board-certified family practitioner, who advised that he was totally disabled and that the disability was due to the employment injury.

The Office referred appellant to Dr. James F. Hood, a Board-certified orthopedic surgeon, for a second opinion. In an April 20, 2009 report, Dr. Hood recounted examining appellant on April 15, 2009 and reviewed the medical evidence. While appellant had residuals of the August 8, 2008 work injury, he could return to work eight hours a day in a sedentary work environment. Dr. Hood found that appellant could stand and walk for 2 hours a day and could sit for eight hours a day with 15-minute breaks every 2 hours. Lifting restrictions were in the sedentary range with an occasional one to 10 pounds floor to waist. Dr. Hood recommended additional diagnostic testing in order to determine whether appellant was, a candidate for decompression laminectomy or lumbar discography. He stated the diagnostic testing was to be ordered by appellant's treating physician.

On May 4, 2009 Maria M. Negrete, a nurse case manager, informed the Office that she met with appellant and Dr. Clement to discuss Dr. Hoods' report. Dr. Clement did not agree with Dr. Hood's recommendation that appellant return to work with restrictions or of obtaining diagnostic studies to rule out surgical intervention. He recommended a functional restoration program (chronic pain program) for at least two weeks. If appellant progressed, then the program would be extended to five or six weeks. If he did not progress, then Dr. Clement would order the work up for surgery. Dr. Clement kept appellant off work.

The Office found a conflict of medical opinion between Dr. Clement and Dr. Hood regarding appellant's ability to work. It referred appellant, together with a statement of accepted facts, a list of questions and the medical record, to Dr. Frank L. Barnes, a Board-certified orthopedic surgeon. In a June 11, 2009 report, Dr. Barnes reviewed appellant's medical record and set forth his examination findings, which revealed left side spasm and flat curvature. Manual muscle testing of the lower limbs was normal while sensory testing of the lower limbs showed hypesthesia between the first and second toes of the right foot in the area served by the L5 nerve root on the right. Dr. Barnes diagnosed a herniated lumbar disc. He advised that there were current residuals of the August 8, 2008 work injury, but that appellant could return to work full time at sedentary duty. This was defined as sitting six to eight hours a day and standing up to two hours a day, but not necessarily standing continuously for two hours. Dr. Barnes stated appellant could lift no more than 10 pounds occasionally and 5 pounds frequently. He provided a June 11, 2009 work-restriction evaluation reiterating that appellant could work full time within restrictions. Dr. Barnes indicated that appellant had not reached maximum improvement as he needed lumbar spine surgery.

In a July 16, 2009 letter, the employing establishment offered appellant a modified city letter carrier position based on Dr. Barnes's opinion that he was capable of returning to full-time sedentary duties. The duties of the modified assignment were to answer telephones and assist customers up to eight hours, assist passport customers sign in up to five hours, answering a dutch door two hours intermittently and hubbing express and priority mail to neighboring post offices

for two hours. The position indicated that six to eight hours would be spent sitting, two hours standing and lifting no more than 10 pounds in eight hours.

In a July 20, 2009 statement, appellant declined the modified assignment. He stated that he could not sit for eight hours and that standing or walking were not always an option due to discomfort and pain. Appellant noted that laying down was the only way he could feel comfort at times. He contended that the side effects of his pain medication caused blurred vision, dizziness, nausea and drowsiness. Appellant further stated the modified assignment was not in compliance with Dr. Barnes' report.

In a July 22, 2009 letter, the employing establishment reoffered appellant a modified city letter carrier position to reflect the only duty was to answer telephones for up to eight hours. The position involved sitting six to eight hours, standing one-hour and lifting no more than 10 pounds for up to eight hours.

In a July 31, 2009 letter, the Office advised appellant that the offered position as a modified city letter carrier was found suitable as it was in accordance with the medical limitations provided by Dr. Barnes. The position remained open and available to him. The Office informed appellant of the penalty provisions of 5 U.S.C. § 8106(c)(2) with respect to refusal of suitable work and afforded him 30 days to either accept the position or provide an explanation for rejecting the position.

In a July 28, 2009 statement, which the Office received on August 10, 2009 appellant declined the modified assignment. He stated it was impossible for him to sit for up to eight hours a day. Appellant stated he would consult with Dr. Barnes on the issue of sitting up to eight hours a day.

In additional treatment notes from Dr. Clement, the physician, reiterated that appellant was totally disabled. In a July 24, 2009 treatment report, Dr. Jonmenjoy Biswas, a Board-certified internist, advised appellant was awaiting approval for surgery. On July 24, 2009 Dr. Biswas noted that appellant was totally disabled from work. In reports of August 7, 2009, Dr. Shannon Mitchel, a general surgeon, opined that appellant could work-restricted duty.

In an August 28, 2009 statement, appellant declined the modified assignment on the grounds his back pain has intensified within the last 8 to 10 weeks. He indicated that he had been rushed to the emergency room because of his back, but the Office refused to authorize his care or surgery.

In a September 8, 2009 letter, the Office informed appellant that his reasons for refusing the position had been considered and were not found to be valid. Appellant was afforded an additional 15 days to accept the position or provide medical evidence to support he was not capable of returning to modified work.

In a September 17, 2009 telephone call, appellant informed the Office that he would be having surgery in 10 days. The Office reiterated that it had not authorized surgery. In a September 18, 2009 telephone call, it explained that Dr. Barnes had found that he would work up to eight hours within restrictions. It also advised appellant that it would consider the request for surgery, but that surgery was not currently authorized.

By decision dated October 7, 2009, the Office terminated appellant's entitlement to monetary compensation benefits finding that he had refused an offer of suitable employment. It accorded special weight to Dr. Barnes' medial opinion as an impartial medical specialist. Appellant's entitlement to medical benefits was not terminated.

LEGAL PRECEDENT

One the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[1] Section 8106(c)(2) of the Federal Employees' Compensation Act[2] provide that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to compensation.[3] The Office may not terminate compensation without establishing that the disability ceased or that it is no longer related to the employment.[4] The Board has held that as monetary compensation payable to an employee under section 8107 are payments made from the Employees' Compensation Fund, they are subject to the penalty provision of section 8106(c).[5]

Section 10.517(a) of the Act's implementing regulations provide that an employee who refused to work after suitable work has been offered to or secured for the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.[6] Pursuant to section 10.516, the employee shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.[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

The Office accepted that appellant sustained lumbar sprain and displacement of lumbar intervertebral disc while in the performance of duty on August 8, 2008. While appellant returned to work for a short period of time, he stopped work on October 6, 2008 and received wage loss for total disability. The Office subsequently terminated appellant's compensation benefits effective October 25, 2009, finding that the offered position was medically suitable. The issue of

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[1] *Barry Neutach*, 54 ECAB 313 (2003); *Lawrence D. Price*, 47 ECAB 120 (1995).

[2] 5 U.S.C. §§ 8101-8193.

[3] *Id.* at § 8106(c)(2); *see also Linda D. Guerrero*, 54 ECAB 556 (2003).

[4] *Ronald M. Jones*, 52 ECAB 190 (2000); *Arthur R. Reck*, 47 ECAB 339 (1995).

[5] *Sandra A. Sutphen*, 49 ECAB 174 (1997); *Stephen R. Lubin*, 43 ECAB 564 (1992).

[6] 20 C.F.R. § 10.517(a); *see Ronald M. Jones, supra* note 4.

[7] *Id.* at § 10.516; *see Kathy E. Murray*, 55 ECAB 288 (2004).

[8] *Manuel Gill,* 52 ECAB 282 (2001).

whether an employee has the physical ability to perform a modified position is a medical question that must be resolved by probative medical evidence.[9]

The Board notes that a conflict in the medical opinion evidence arose between, Dr. Clement, an attending physician, who supported appellant's total disability due to the work injury and Dr. Hood, an Office referral physician, who found that appellant could perform light-duty work with restrictions. The Office properly referred appellant to Dr. Barnes, selected as the impartial medical specialist.[10]

In a June 11, 2009 report, Dr. Barnes reviewed appellant's medical record and described his physical examination of appellant. He listed findings on examination and diagnosed a herniated lumbar disc. Dr. Barnes advised that there were current residuals of the August 8, 2008 work injury, but that appellant could return to work full time at sedentary duty. He listed restrictions of sitting six to eight hours a day, standing up to two hours a day and lifting no more than 10 pounds occasionally and 5 pounds frequently. Dr. Barnes indicated that, while appellant needed lumbar spine surgery, he was able to work eight hours daily within restrictions.

The Board finds that Dr. Barnes provided a complete and rationalized opinion based on an accurate factual and medical background. His opinion, that appellant could return to full-time light-duty work with restrictions on lifting, is accorded special weight due to his status as an impartial medical examiner.[11] Appellant did not submit sufficient medical evidence to establish that he could not return to light-duty work within the restrictions recommended by Dr. Barnes. Although Dr. Clement submitted reports reiterating that appellant remained disable, his reports did not contain a rationalized opinion explaining how appellant's total disability was due to his employment injury.[12] The Board finds that Dr. Barnes' 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 city letter carrier based on the physical limitations of the impartial medical specialist. The physical requirements for the position included sitting six to eight hours, standing one hour and lifting no more than 10 pounds for up to eight hours. The Board finds that the physical requirements of the offered modified city letter carrier position fall within appellant's work restrictions as defined by Dr. Barnes. The weight of the medical evidence establishes that he was no longer totally disabled from work, but had the physical capacity to perform the duties listed in the July 22, 2009 job offer.

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

[10] *See R.H.,* 59 ECAB 382 (2008).

[11] *See L.W.*, 59 ECAB 471 (2008).

[12] *Id.* Dr. Clement was on one side of the original conflict. A subsequently submitted report of a physician on one side of a resolved conflict of medical opinion is generally insufficient to overcome the weight of the impartial medical specialist or to create a new conflict of medical opinion. *Richard O Brien*, 53 ECAB 234 (2001).

In accordance with the procedural requirements under 5 U.S.C. § 8106(c), the Office advised appellant on July 31, 2009 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 of record, the Office advised appellant in a September 8, 2009 letter 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. The Board notes Dr. Mitchel opined that appellant could work restricted duty. The reports from Dr. Clement are, as noted, deficient in explaining the reasons why appellant remained totally disabled.[13] Although Dr. Biswas opined in his July 24, 2009 reports that appellant was totally disabled from work and was awaiting approval for surgery, he did not provide a rationalized opinion explaining why appellant remained disabled for work due to his employment injuries. The Board finds that these reports are insufficient to overcome the weight accorded the opinion of Dr. Barnes or to create another medical conflict. The weight of the medical evidence does not support inability to perform the duties of the offered position.[14] The Board finds that the Office followed established procedures prior to the termination of compensation pursuant to section 8106(c) of the Act.

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 contends on appeal that he cannot perform the duties of the offered position due to continued pain and his need for back surgery. As noted, the evidence is sufficient to establish that he has the capacity to perform the duties of the offered position. His physical ability to work is a medical matter. Dr. Barnes, the impartial specialist, was aware that appellant would need back surgery but found that he was capable of modified work full time within restrictions. There is no evidence that appellant underwent the surgery and had any associated disability prior to the Office's October 7, 2009 decision.

CONCLUSION

The Board finds that the Office met its burden to terminate appellant's compensation benefits effective October 25, 2009 on the grounds that he refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c).

[13] *See id.*

[14] 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).

ORDER

IT IS HEREBY ORDERED THAT the October 7, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 19, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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