United States Department of Labor
Employees' Compensation Appeals Board

M.T., Appellant	)	
and	)	**Docket No. 10-2337**
	)	**Issued: August 1, 2011**
DEPARTMENT OF THE AIR FORCE, WESTOVER AIR FORCE BASE, MA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 20, 2010 appellant filed an appeal from a June 22, 2010 decision of the Office of Workers' Compensation Programs (OWCP) in which a hearing representative affirmed the termination of his wage-loss compensation on the grounds that he refused an offer of suitable work. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 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 OWCP properly terminated appellant's compensation benefits effective February 8, 2010 pursuant to 5 U.S.C. § 8106(c).

On appeal, appellant's attorney asserts that the decision is contrary to fact and law.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On September 16, 2009 appellant, then a 39-year-old construction inspector, sustained an employment-related compression fracture at L1 while moving furniture at work.[2] In reports dated October 20 to November 18, 2009, Dr. Ronald Paasch, an attending Board-certified physiatrist, advised that appellant should not work, pending treatment. By report dated November 4, 2009, Dr. Franco M. DeSantis, a Board-certified internist, reported the history of injury and described appellant's care. He advised that appellant was last seen on October 20, 2009 and recommended that he remain off work until evaluated and cleared to return to work.

On November 20, 2009 Dr. Paasch and Dr. Scott R. Cooper, an associate also a Board-certified physiatrist, advised that appellant could return to work on November 21, 2009 with restrictions of no lifting over 10 pounds repetitively and 20 pounds occasionally with limited stooping and bending. Appellant was to change positions as needed.

On November 23, 2009 the employing establishment offered appellant a modified position as a construction inspector, with retained grade and pay. The physical restrictions were those prescribed by Drs. Paasch and Cooper. Most of the duties would be performed in an office environment with occasional spot inspections that would require no lifting and limited stooping and bending. Appellant was to be responsible for finishing the paperwork for the previous fiscal year's custodial contract, work on the custodial contract for the present year and aid in assembling the solicitation package for the next major custodial contract. On November 23, 2009 he reported to a medical management nurse that he had fallen in the shower and was having increased pain.

By report dated November 30, 2009, Dr. DeSantis advised, "This is to certify that [appellant] is currently under my medical supervision and continues to be unable to work. Date of his return is unclear at this point." On December 1, 2009 Dr. Cooper performed bilateral L1-2 transforaminal epidural injections.

By letter dated December 9, 2009, OWCP advised appellant that the position offered was suitable. Appellant was notified that, if he failed to report to work or failed to demonstrate that the failure was justified, pursuant to section 8106(c)(2) of FECA, his right to compensation for wage loss or a schedule award would be terminated. He was given 30 days to respond.

Appellant was scheduled for a medical appointment on December 17, 2009 and did not appear. In a letter received on December 18, 2009, he informed OWCP that he had moved to Visalia, California, for a family emergency. On December 21, 2009 OWCP forwarded a copy of the December 9, 2009 letter to appellant's California address. Appellant was given an additional 30 days to respond. OWCP authorized a medical consultation in California. Medical evidence previously of record was submitted.

[2] A September 24, 2009 magnetic resonance imaging (MRI) scan study of the lumbar spine demonstrated an acute or subacute mild compression fracture of the superior end plate of the L1 vertebral body with no evidence of retropulsion and mild disc bulging of the L2-3 through L5-S1 discs without definite nerve root compression.

On January 21, 2010 OWCP advised appellant that his reasons for refusing the offered position were not valid and he was given an additional 15 days to accept. On February 8, 2010 it noted that there were no Air Force bases within commuting distance of Visalia, California and that the offered position remained available.

By decision dated February 8, 2010, OWCP terminated appellant's compensation benefits on the grounds that he refused to accept an offer of suitable work.[3] By report dated February 4, 2010, received by OWCP on February 17, 2010, Henry Read, a nurse practitioner, described the history of injury and noted appellant's complaint of chronic low back pain. He provided examination findings and diagnosed chronic low back pain following L2 vertebral body compression fracture.

On February 26, 2010 appellant requested a review of the written record. He submitted a March 5, 2010 MRI scan study of the lumbar spine that demonstrated an anterior wedge compression fracture of the L1 vertebral body with low level internal bone marrow edema adjacent to the superior end plate and mild bulging discs at L3-3 through L5-S1 resulting in bilateral neural foraminal narrowing with no evidence of disc herniations or significant central canal stenosis. By report dated March 11, 2010, Dr. Timothy C. Watson, a Board-certified orthopedic surgeon, noted the MRI scan findings and recommended a posterior spinal fusion from T12 to L2. He advised that appellant could not work due to surgery and postoperative period. On April 29, 2010 OWCP's medical adviser opined that the surgery seemed reasonable and on May 18, 2010 the surgery was authorized.

By decision dated June 22, 2010, OWCP's hearing representative affirmed the February 8, 2010 decision, finding that appellant refused an offer of suitable employment.

LEGAL PRECEDENT

Section 8106(c) of FECA 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] It is OWCP's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[5] 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.[6]

[3] OWCP noted that no work was available in the Visalia, California, commuting area and that, because appellant remained on the employing establishment's employment rolls, relocation expenses need not be addressed.

[4] 5 U.S.C. § 8106(c).

[5] *Joyce M. Doll*, 53 ECAB 790 (2002).

[6] 20 C.F.R. § 10.517(a).

To justify termination, OWCP must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[7] 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.[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] OWCP's 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.[10]

OWCP regulations provide that the employer, if possible, should offer suitable reemployment in the location where the employee currently resides. If this is not practical, the employer may offer suitable reemployment at the employee's former duty station or other location.[11] A preference for the area in which a claimant resides is not an acceptable reason for refusing an offered position.[12]

ANALYSIS

OWCP accepted that appellant sustained a compression fracture to L1 on September 16, 2009. On February 8, 2010 it terminated his monetary compensation on the grounds that he refused a November 23, 2009 offer of suitable employment by the employing establishment. The initial question is whether OWCP properly determined that the offered position was suitable, a medical question that must be resolved by the medical evidence.[13] The Board finds that medical evidence of record establishes that the November 23, 2009 position offered by the employing establishment was suitable.

In November 20, 2009 reports, Drs. Paasch and Cooper, attending Board-certified physiatrists, advised that appellant could return to work on November 21, 2009 with restrictions of no lifting over 10 pounds repetitively and 20 pounds occasionally. Appellant was to change positions as needed and stooping and bending were to be limited. On November 23, 2009 the employing establishment offered him a modified position as a construction inspector. The physical restrictions were in the limitations as prescribed by Drs. Paasch and Cooper.

---

[7] *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[8] 20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB 681 (2004).

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

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity, Refusal of Job Offer*, Chapter 2.814.5.a(1) (July 1997); *see Lorraine C. Hall*, 51 ECAB 477 (2000).

[11] 20 C.F.R. § 10.508; *Sharon L. Dean*, 56 ECAB 175 (2004).

[12] *E.H.*, Docket No. 08-1862 (issued July 8, 2009).

[13] *Gayle Harris*, *supra* note 9.

Appellant submitted a November 30, 2009 report from Dr. DeSantis who stated that he was unable to work. Dr. DeSantis had previously advised on November 4, 2009 that appellant could not return to work until cleared by physiatry. As noted, on November 20, 2009, Drs. Paasch and Cooper found that appellant could return to modified work. Furthermore, in his brief November 30, 2009 report, Dr. DeSantis did not state that he had recently examined appellant or reviewed the offered position. His November 30, 2009 report is of diminished probative value.

At the time the job offer was made on November 23, 2009, appellant had not relocated to California. An employee's move away from the area in which the employing establishment is located is an unacceptable reason for refusing to accept an offered position if the employee is still on the agency rolls. Personal reasons for an unwillingness to relocate, will not justify the refusal of an offer of suitable work.[14]

The Board finds that OWCP properly determined that the offered position was suitable as the weight of the medical evidence on February 8, 2010 established that appellant was no longer totally disabled from work and had the physical capacity to perform the modified duties described in the November 23, 2009 job offer.

In order to properly terminate appellant's compensation under section 8106 of FECA, OWCP must provide his notice of its finding that an offered position is suitable and give him an opportunity to accept or provide reasons for declining the position.[15] The record in this case indicates that OWCP properly followed the procedural requirements. By letters dated December 9 and 21, 2009, OWCP advised appellant that the offered position was suitable. Appellant was notified that, if he failed to report to work or failed to demonstrate that the failure was justified, his right to monetary compensation would be terminated and he was allotted 30 days to either accept or provide reasons for refusing the position. On January 21, 2010 he was given an additional 15 days in which to respond. There is therefore no evidence of a procedural defect in this case as OWCP provided appellant with proper notice. Appellant was offered a suitable position by the employing establishment and the offer was refused. Thus, under section 8106(c) of FECA, his monetary compensation was properly terminated effective October 25, 2009 on the grounds that he refused an offer of suitable employment.[16]

After OWCP established that the offered position was suitable, the burden shifted to appellant to show that his refusal was reasonable or justified.[17] The February 4, 2010 report from Mr. Read is not considered competent medical evidence as nurse practitioners are not "physicians" as defined under FECA and their opinions are of no probative value.[18] The

[14] *Bruce Sanborn*, 49 ECAB 176 (1997).

[15] *See Maggie L. Moore*, *supra* note 7.

[16] *Joyce M. Doll*, *supra* note 5.

[17] *M.S.*, 58 ECAB 328 (2007).

[18] *S.E.*, Docket No. 08-2214 (issued May 6, 2009). Section 8101(2) of FECA provides that "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2); *see Roy L. Humphrey*, 57 ECAB 238 (2005).

March 5, 2010 lumbar MRI scan study, does not contain any opinion regarding appellant's ability to work. In his March 11, 2010 report, Dr. Watson provided examination findings and recommended surgery. However, he did not provide an opinion on the suitability of the offered position or whether appellant could have performed the position's duties beginning in November 2009.

An employee who refuses or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified.[19] The Board finds that OWCP properly terminated appellant's monetary compensation due to his refusal of suitable work and that he did not, thereafter, establish that his refusal of suitable work was justified.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly terminated appellant's wage-loss compensation pursuant to 5 U.S.C. § 8106(a).

[19] 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the June 22, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 1, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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