United States Department of Labor
Employees' Compensation Appeals Board

M.M., Appellant	)	
and	)	**Docket No. 11-467**
	)	**Issued: September 26, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Wantagh, NY, Employer	)	

Appearances:
Alan J. Shapiro, 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 21, 2010 appellant filed a timely appeal from the November 19, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) terminating his compensation for refusing an offer of suitable work. Pursuant to the Federal Employees' Compensation Act (FECA)[1] 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 effective May 12, 2010 on the grounds that he refused an offer of suitable work.

[1] 20 C.F.R. § 8101 *et seq.*

FACTUAL HISTORY

On August 9, 1999 appellant, then a 29-year-old part-time flexible letter carrier, sustained injury due to a motor vehicle accident at work.[2] OWCP accepted that he sustained a cervical strain. Appellant stopped work on August 10, 1999 and was paid compensation for total disability.

In an August 12, 1999 report, Dr. Thomas M. Mauri, an attending Board-certified orthopedic surgeon, advised that appellant was involved in an August 9, 1999 motor vehicle accident which caused pain in his neck and right arm. He stated that appellant had prior cervical and thoracic sprains/strains with right-sided disc herniation at C4-5, but noted that his condition had greatly improved by July 1999. Dr. Mauri diagnosed severe cervical strain/sprain with possible cervical radiculitis and determined that appellant could not work. Magnetic resonance imaging (MRI) scan testing of appellant's cervical spine from August 25, 1999 showed protrusions at C3-4 and C4-5 with narrowing at C4-5.

In a February 9, 2000 report, Dr. Richard S. Goodman, a Board-certified orthopedic surgeon, serving as an OWCP referral physician, opined that the August 9, 1999 work accident caused a cervical herniated disc. He stated that appellant should return to Dr. Mauri for surgery and recommended various work restrictions, including working no more than four hours a day and lifting no more than five pounds. On February 28, 2000 Dr. Goodman indicated that appellant could only return to work for eight hours a day if he had successful spinal surgery.

In a June 5, 2000 letter, OWCP asked the employing establishment to offer appellant limited-duty work consistent with Dr. Goodman's restrictions. It does not appear that the employing establishment offered him a job at this time.

A June 19, 2000 MRI scan showed a small C3-4 disc herniation with mild thecal sac compression and osteophyte formation at C4-5 and C5-6 with mild thecal sac compression. In a May 14, 2001 report, Dr. Mauri noted that he did not find appellant was a candidate for surgery. He stated that appellant could go back to more normal activities as tolerated without doing permanent damage to his spine, but noted, "[H]e may have such significant exacerbation of his pain that he may not be able to tolerate it."

Between 2000 and 2002, appellant received regular acupuncture treatments from Liming Zhao, a licensed acupuncturist. He also received medical treatment from Dr. Alexander Lee, a Board-certified physiatrist, who diagnosed cervical facet syndrome on January 8, 2001. It appears from the record that appellant did not receive any notable treatment from physicians between early 2001 and early 2009.

OWCP referred appellant for a second opinion evaluation to Dr. P. Leo Varriale, a Board-certified orthopedic surgeon. In an April 30, 2009 report, Dr. Varriale provided a review of appellant's history of injury and medical treatment. He stated that appellant presently complained of neck pain with radiating to the mid back but not to the arms. Dr. Varriale reported the findings of his physical examination of appellant noting that he had no tenderness or

[2] Appellant's van was struck by another vehicle on the left rear side.

spasm of the cervical spine and did not have any strength or sensory deficits in his upper extremities. Appellant did have some mild restriction of cervical motion. Dr. Varriale diagnosed herniated disc of the cervical spine, mainly preexisting and advised that the herniated disc was partly related to the August 9, 1999 accident but was partly preexisting. He wrote there was a "mild disability" and that appellant could work eight hours a day with no lifting of more than 20 pounds. In a May 4, 2009 work restrictions form, he indicated a restriction of lifting no more than 20 pounds for seven hours a day.

In a July 29, 2009 letter, OWCP inquired whether the employing establishment could offer appellant limited-duty work consistent with Dr. Varriale's work restrictions. On August 20, 2009 the employing establishment offered appellant a job as a limited-duty city carrier with duties of casing mail three hours a day and walking a delivery route five hours a day at the employing establishment. Appellant was told that the availability date of the position was September 5, 2009. The position required lifting letters and flats at or above shoulder level for up to three hours a day, carrying and lifting mail weighing up to 20 pounds for up to two hours a day, driving a postal vehicle for up to five hours a day and walking to delivery points for up to five hours a day.

In a September 22, 2009 letter, OWCP advised appellant of its determination that the limited-duty city carrier position offered by the employer 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 an October 19, 2009 letter, appellant indicated that he wanted to temporarily refuse the limited duty until he saw an orthopedic surgeon of his choosing for another opinion on his ability to work because Dr. Goodman had stated that appellant could not return to work unless he underwent neck surgery. He noted that he would provide OWCP with the name and address of the physician of his choosing. Appellant stated that he did not feel he obtained proper care and diagnosis. He asserted that Dr. Varriale did not really examine him before providing an opinion that he could go back to work.

In a December 3, 2009 letter, OWCP advised appellant that his reasons for not accepting the offered position were unjustified. It noted that he wanted to temporarily refuse the limited duty until he saw a physician of his own choosing, but he had not identified any orthopedic surgeon or provided a medical report to support his refusal of the job offer. OWCP advised appellant that no further reasons for nonacceptance of the offered position would be considered and that his compensation would be terminated if he did not accept the position within 15 days of the date of the letter.

In a May 1, 2010 letter, appellant stated that in 2000 Dr. Goodman had stated that appellant could not return to work for eight hours a day as a letter carrier until he had surgery. He indicated that he sent medical documents to the employing establishment, but not to OWCP. Appellant claimed that his employer never gave him a starting date or contacted him about the limited-duty position. He reasserted that Dr. Varriale did not properly or thoroughly evaluate him and that the physician's opinion on his ability to work was contrary to that of Dr. Goodman. Appellant indicated that he was requesting approval to see an orthopedic specialist of his choice. He did not accepted the limited-duty city carrier position.

On May 12, 2010 an OWCP claims examiner spoke with an employing establishment official who confirmed that the limited-duty city carrier position remained open to appellant.

In a May 12, 2010 decision, OWCP terminated appellant's compensation effective May 12, 2010 on the grounds that he refused an offer of suitable work. It found that the medical opinion of Dr. Varriale showed that the limited-duty city carrier position was suitable and that appellant did not present good cause for refusing the position.

Appellant requested a telephone hearing with an OWCP hearing representative. During the August 12, 2010 hearing, he reiterated that Dr. Goodman had stated that he needed surgery and could not return to work until surgery was performed, but he chose not to have surgery. Appellant asserted that the employing establishment offered him limited-duty work, which actually was full-duty work. He claimed that he would have to lift mailbags weighing 35 pounds in order to perform the job. Appellant temporarily refused the limited-duty job because he wanted to see a physician of his choosing, but OWCP did not authorize an examination and he could not financially afford to see a physician on his own. Counsel argued that the limited-duty city carrier position was not offered in good faith because the employer was laying off limited-duty employees under the National Reassessment Project. He further argued that the job offer was for makeshift work and did not constitute a suitable job. Counsel indicated that appellant was not represented by counsel at the time of the job offer and asserted that he did not understand that he would lose all monetary compensation if he refused the job offer. He further argued that the limited-duty job offer was vague and contrary to what Dr. Varriale stated appellant should do. Counsel claimed that OWCP's regulations required it to send the job offer to appellant's physician for an opinion on whether he could perform the duties of the job.

In a November 19, 2010 decision, an OWCP hearing representative affirmed the May 12, 2010 decision.

LEGAL PRECEDENT

Section 8106(c)(2) 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."[3] However, to justify such termination, OWCP must show that the work offered was suitable.[4] 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.[5]

ANALYSIS

On August 9, 1999 appellant sustained a cervical strain due to a motor vehicle accident at work. He received compensation for periods of total disability due to this injury. OWCP

[3] 5 U.S.C. § 8106(c)(2).

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

[5] 20 C.F.R. § 10.517; *see Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

terminated appellant's compensation effective May 12, 2010 for refusing an offer of suitable work.

The medical evidence of record establishes that appellant was capable of performing the limited-duty city carrier position offered by the employing establishment and determined to be suitable by OWCP in September 2009. The position involved casing mail three hours a day and walking a delivery route five hours a day. The duties required lifting letters and flats at or above shoulder level for up to three hours a day, carrying and lifting mail weighing up to 20 pounds for up to two hours a day, driving a postal vehicle for up to five hours a day and walking to delivery points for up to five hours a day.

In determining that appellant was physically capable of performing the limited-duty city carrier position, OWCP properly relied on the opinion of Dr. Varriale, a Board-certified orthopedic surgeon who served as a referral physician. In an April 30, 2009 report, Dr. Varriale noted that appellant had no tenderness or spasm of the cervical spine and did not have any strength or sensory deficits in his upper extremities. Appellant did have some mild restriction of cervical motion. Dr. Varriale diagnosed herniated disc of the cervical spine and indicated that appellant could work eight hours a day with no lifting of more than 20 pounds. In a May 4, 2009 work restriction form, he listed a restriction of lifting no more than 20 pounds for seven hours a day.

The Board finds that Dr. Varriale performed a thorough examination and evaluation of appellant's medical condition and the work restrictions he recommended would allow appellant to perform the limited-duty city carrier position offered by the employing establishment.[6] Appellant claimed that the opinion of Dr. Goodman, a Board-certified orthopedic surgeon who served as an OWCP referral physician, showed that he could not perform the offered position. Dr, Goodman provided an opinion in February 2000, some nine years prior and his opinion is not relevant to appellant's ability to work the limited-duty city carrier position offered in 2009. Appellant did not submit any contemporaneous medical evidence addressing his capacity to perform the offered position. It appears from the record that he did not receive any notable treatment from physicians from early 2001 and early 2009. For these reasons, OWCP properly determined that the limited-duty city carrier offered by the employing establishment was suitable.

The Board finds that the limited-duty city carrier position offered by the employing establishment is suitable. As noted, once OWCP has established that, a particular position is suitable, 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.

After OWCP advised appellant of the suitability of the limited-duty city carrier position, he stated that he was temporarily refusing the job offer and that he would advise OWCP of the

[6] Appellant asserted that Dr. Varriale's examination was inadequate but he did not adequately explain the basis for this assertion.

name of a physician of his own choosing for another medical opinion.[7] However, appellant did not subsequently advise OWCP of the name of a physician of his own choosing and OWCP then advised him, in a December 3, 2009 letter, that his reasons for nonacceptance were not considered to be good cause and that it would not consider further reasons for nonacceptance. OWCP advised appellant that he had 15 days from the date of the December 3, 2009 letter to accept the offered position but he did not do so within the allotted time. Counsel argued that appellant did not understand that his compensation would be terminated if he did not accept the position, but OWCP explicitly advised him of the consequences of nonacceptance. He claimed that the limited-duty city carrier position was not offered in good faith because the employing establishment was laying off limited-duty employees under the National Reassessment Project. The mere fact that employing establishment might have been laying off some workers in 2009 does not, in itself, establish that the particular offer made to appellant was not valid. Counsel further argued that the job offer was for makeshift work and that a makeshift job by definition could not be a suitable job. However, the prohibition against makeshift work refers to work upon which determinations of loss of wage-earning capacity are based.[8]

The Board has carefully reviewed the argument submitted by appellant in support of his refusal of the limited-duty city carrier position and notes that it is not sufficient to justify his refusal of the position. For these reasons, OWCP properly terminated his compensation effective May 12, 2010 on the grounds that he refused an offer of suitable work.[9]

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 compensation effective May 12, 2010 on the grounds that he refused an offer of suitable work.

[7] Appellant has asserted that the employing establishment did not tell him what the limited-duty work required or where to report. However, the employing establishment's written job offer did advise appellant regarding these matters.

[8] *See James D. Champlain*, 44 ECAB 438, 440-41 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.7a(1) (July 1997).

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

ORDER

IT IS HEREBY ORDERED THAT the November 19, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 26, 2011
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