

**United States Department of Labor
Employees' Compensation Appeals Board**

D.C., Appellant)	
)	
and)	Docket No. 12-459
)	Issued: August 10, 2012
DEPARTMENT OF THE AIR FORCE,)	
ROBINS AIR FORCE BASE, GA, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 22, 2011 appellant filed a timely appeal from the June 30, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP), which terminated his compensation.¹ Pursuant to the Federal Employees' Compensation Act² (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 under 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On July 20, 1992 appellant, a 43-year-old aircraft mechanic, sustained a traumatic injury in the performance of duty when an 80-pound aircraft door fell approximately 4 feet onto his left

¹ Because using the date of delivery, December 29, 2011, as the date of filing would render the appeal untimely, the appeal is considered to have been filed as of the date of postmark, December 22, 2011. 20 C.F.R. § 501.3(f)(1).

² 5 U.S.C. § 8101 *et seq.*

arm. OWCP accepted his claim for contusions, left ulnar nerve lesion and reflex sympathetic dystrophy of the left upper extremity. Appellant received compensation for temporary total disability on the periodic rolls. He also received a 70 percent disability rating from the Department of Veterans Affairs (VA) for a service-connected post-traumatic stress disorder.

In 2006 Dr. Jeffrey A. Fried, a Board-certified orthopedic surgeon, conducted a second opinion examination and evaluation. He noted that appellant had problems with post-traumatic stress disorder probably from the Vietnam War, and that the VA had increased his disability rating from 30 percent to 70 percent due to stress from his work injury. Dr. Fried found substantial objective findings in addition to a history of psychiatric problems. He outlined restrictions and noted that psychiatric problems could reduce appellant's potential for vocational rehabilitation.

On November 5, 2008 Dr. Douglas P. Hein, a Board-certified orthopedic surgeon, conducted a second opinion examination and evaluation. He noted that appellant had a preexisting post-traumatic stress disorder that apparently was aggravated since the injury. After describing his findings on physical examination, Dr. Fried found significant objective abnormality in the left upper extremity. He concluded that appellant was capable of greater motion than he voluntarily performed: "This is based on, in my opinion, a psychological abnormality which is manifested in a conversion reaction as well as the regional pain syndrome." As appellant had no physical abnormalities on the right side, Dr. Hein found that appellant could be engaged in a clerical-type activity and specified physical restrictions.

On August 7, 2009 the employer offered appellant full-time sedentary work as a clerk. Appellant declined the offer. OWCP found that the offered position was suitable to the medical limitations imposed by Dr. Hein and allowed appellant 30 days to accept or explain his reasons for refusing.

OWCP received information that the VA rated appellant permanently and totally disabled. It explained that the ruling had no bearing on his workers' compensation case and allowed appellant an additional 15 days to accept.

In a May 4, 2010 decision, OWCP terminated appellant's wage-loss compensation on the grounds that he refused an offer of suitable work in violation of 5 U.S.C. § 8106(c)(2). Having received no further information from him, OWCP found that he failed to provide an acceptable reason to support that he could not perform the duties of the offered position.

Appellant requested reconsideration. His wife noted that he had a preexisting post-traumatic stress disorder that OWCP had to consider, not just what Dr. Hein reported. She claimed that the employment injury exacerbated appellant's psychiatric condition, causing a long list of medications. Appellant's wife argued that he had no quality of life and could not function well enough to be out of his bedroom for over an hour from time to time.

On June 30, 2011 OWCP reviewed the merits of appellant's case and denied modification of its prior decision. It explained that whether his preexisting post-traumatic stress disorder and medications prevented him from working was a medical issue, and OWCP had provided him an opportunity to accept the offered job or show good cause for refusing, but he presented no medical evidence to support his argument. Moreover, OWCP noted Dr. Hein's report reflected knowledge of appellant's psychiatric disorder and medications.

LEGAL PRECEDENT

Section 8106(c)(2) of FECA states that a partially disabled employee who refuses to seek suitable work, or refuses or neglects to work after suitable work is offered to, procured by or secured for him or her is not entitled to compensation.³ OWCP has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be terminated, however, it has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.⁴ In other words, to justify termination of compensation under section 8106(c)(2), which is a penalty provision, OWCP has the burden of showing that the work offered to and refused or neglected by appellant was suitable.⁵

OWCP will make every reasonable effort to arrange for employment of a partially disabled claimant, first with the employing establishment and then with a new employer. This effort will take into account both medical conditions which preexisted the injury and those which arose afterwards.⁶

ANALYSIS

When OWCP reviewed the offered position and found it suitable, it relied on the opinion of Dr. Hein, a second opinion orthopedic surgeon, who cleared appellant to engage in clerical activity. Dr. Hein acknowledged that appellant had a preexisting post-traumatic stress disorder that was apparently aggravated since the injury. He noted that appellant had a psychological abnormality that was manifested in a conversion reaction as well as regional pain syndrome. Dr. Fried, the second opinion orthopedic surgeon before him, also noted a history of psychiatric problems and a VA disability rating that increased from 30 to 70 percent after the injury. It was his opinion that psychiatric problems could reduce appellant's potential for vocational rehabilitation.

Because the record establishes that appellant had a preexisting post-traumatic stress disorder that could reduce his vocational potential, it was incumbent on OWCP to determine whether the offered position was suitable from a psychiatric viewpoint. OWCP did provide appellant an opportunity to submit medical evidence to support that his preexisting condition and medications prevented him from accepting the offer, but it has the burden of proof to establish that the offered position was suitable. This burden pertains to appellant's accepted orthopedic or physical conditions and to the preexisting psychiatric disorder.

³ 5 U.S.C. § 8106(c)(2).

⁴ *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

⁵ *Glen L. Sinclair*, 36 ECAB 664 (1985).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2. 814.3 (December 1993).

OWCP did not meet its burden of proof. It developed the medical evidence only from an orthopedic viewpoint, as though the accepted physical conditions were the only relevant issue. As OWCP failed to establish that the offered position was suitable to appellant's preexisting psychiatric disorder, the Board finds that it has erroneously terminated his compensation under section 8106(c)(2). It has not established that the offered position was, in fact, suitable.

The Board will reverse OWCP's June 30, 2011 decision denying modification of the May 4, 2010 termination of appellant's wage-loss compensation. On return of the record, OWCP shall retroactively reinstate his compensation.

CONCLUSION

The Board finds that OWCP improperly terminated appellant's compensation under 5 U.S.C. § 8106(c)(2). OWCP did not establish that the offered position was suitable.

ORDER

IT IS HEREBY ORDERED THAT the June 30, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 10, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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