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S.A., Appellant	)	
	)	
and	)	Docket No. 12-1151
	)	Issued: November 8, 2012
DEPARTMENT OF THE ARMY,	)	
INSTALLATION MANAGEMENT	)	
COMMAND, Fort Drum, NY, Employer	)	
	)	

Case Submitted on the Record

² The Board notes that, following the issuance of the March 28, 2012 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. See 20 C.F.R. § 501.2(c)(1).

On appeal, appellant's attorney contends that appellant was justified in declining the offered position as he is medically unable to return to work due to his paranoid schizophrenia.

FACTUAL HISTORY

On December 18, 2000 appellant, then a 43-year-old maintenance worker, sustained a traumatic injury in the performance of duty while lifting buckets of paint. OWCP accepted his claim for low back sprain. Appellant received compensation for temporary total disability on the periodic rolls.³

In a June 1, 2011 report, Dr. Paul S. Curtis, a Board-certified orthopedic surgeon and appellant's treating physician, diagnosed lumbar intervertebral disc displacement without myelopathy, spinal stenosis lumbar region, sciatica and lumbago. He opined that the incident appellant described was the competent medical cause of his conditions.

OWCP referred appellant for a second opinion evaluation. In a June 2, 2011 report, Dr. Marco Berard, a Board-certified orthopedic surgeon, reviewed the medical record and a statement of accepted facts. Upon examination he diagnosed low back strain and opined that appellant had not reached his full recovery. Dr. Berard advised that appellant should be labeled as light duty and occasionally lift up to 20 pounds, frequently up to 10 pounds and constantly 0 pounds. He concluded that appellant could not work his regular duty as a maintenance worker but was capable of full-time light-duty work.

Appellant submitted reports dated August 31 and December 5, 2011 by Dr. Curtis diagnosing cervical intervertebral disc degeneration.

On December 12, 2011 the employing establishment offered appellant full-time light-duty work as a motor vehicle dispatcher. Appellant declined the offer.

By letter dated January 4, 2012, OWCP found that the offered position was suitable to the medical limitations imposed by Dr. Berard and allowed appellant 30 days to accept or explain his reasons for refusing.

In a January 19, 2012 letter, appellant's attorney argued that appellant's refusal of the offered position was justified as he was diagnosed with paranoid schizophrenia rendering him unemployable.

On February 6, 2012 OWCP notified appellant that it had considered all the reasons he provided for refusing to accept the offered position and did not find them to be valid. It explained that he had 15 additional days to accept the position or his entitlement to compensation benefits would be terminated.

³ By decision dated March 17, 2003, OWCP found an overpayment of compensation in the amount of \$639.21 because Basic Life Insurance and Optional Life Insurance were not deducted from the wage-loss compensation that appellant received for the period February 11, 2001 to August 10, 2002.

Appellant submitted a February 2, 2012 report by Jonathan Ecker, MD, who stated that he had treated appellant for paranoid schizophrenia since July 2002. He was first hospitalized for the condition while serving in the Navy when he was 18 years old and was hospitalized many other times after that. In August 2004, the Department of Veterans Affairs increased appellant's level of service-connected disability from 30 to 70 percent for paranoid schizophrenia. Appellant was judged to be unemployable because of his psychiatric condition. According to Dr. Ecker, appellant continued to have auditory hallucinations despite taking his medication as prescribed. He opined that appellant was totally disabled from work due to his psychiatric condition of paranoid schizophrenia.

By decision dated March 28, 2012, 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). It found that Dr. Berard's report represented the weight of the medical evidence.

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.⁴ 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.⁵ 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.⁶

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 employing establishment. This effort will take into account both medical conditions which preexisted the injury and those which arose afterwards.⁷

ANALYSIS

When OWCP reviewed the offered position and found it suitable, it relied on the opinion of Dr. Berard, a second opinion orthopedic surgeon, who found appellant capable of light-duty work. Appellant submitted a February 2, 2012 report from Dr. Ecker, who stated that he had treated appellant for paranoid schizophrenia since July 2002. He had been hospitalized for the

⁴ 5 U.S.C. § 8106(c)(2).

⁵ See *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

⁶ See *Glen L. Sinclair*, 36 ECAB 664 (1985).

⁷ See *J.N.*, Docket No. 09-1621 (issued July 14, 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.3 (December 1993).

condition a number of times. In August 2004, the Department of Veterans Affairs increased appellant's service-connected disability from 30 to 70 percent. Appellant was judged to be unemployable because of his psychiatric condition. Dr. Ecker reported that appellant continued to have auditory hallucinations despite taking his medication as prescribed. He opined that appellant was totally disabled from work due to his psychiatric condition of paranoid schizophrenia.

Because the record establishes that appellant had a preexisting paranoid schizophrenia condition that could affect his employability, it was incumbent on OWCP to determine whether the offered position was suitable from a psychiatric viewpoint. OWCP did provide him 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.

OWCP did not meet its burden of proof. It developed the medical evidence only from an orthopedic viewpoint. 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).⁸ OWCP has not established that the offered position was, in fact, suitable based on the preexisting psychiatric condition.

The Board will reverse OWCP's March 28, 2012 decision terminating 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) as it did not establish that the offered position was suitable.

⁸ See *D.C.*, Docket No. 12-459 (issued August 10, 2012) (where the Board held that OWCP did not meet its burden of proof to terminate appellant's compensation as it failed to establish that the offered position was suitable to his preexisting post-traumatic stress disorder).

ORDER

IT IS HEREBY ORDERED THAT the March 28, 2012 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 8, 2012
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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