United States Department of Labor
Employees' Compensation Appeals Board

C.M., Appellant	)	
and	)	**Docket No. 12-339**
	)	**Issued: October 25, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Cincinnati, OH, 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 5, 2011 appellant, through his attorney, filed a timely appeal of the August 15, 2011 merit decision of the Office of Workers' Compensation Programs' (OWCP) and the September 27, 2011 nonmerit decision. 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.

ISSUES

The issues are: (1) whether OWCP properly terminated appellant's compensation benefits effective November 14, 1994 pursuant to 5 U.S.C. § 8106(c); and (2) whether OWCP abused its discretion by denying his request for an oral hearing.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

Appellant, a 47-year-old rural mail carrier, injured his lower back on December 15, 1987. He filed a claim for benefits, which OWCP accepted for lumbar strain and herniated disc. Appellant was paid compensation for temporary total disability and placed on the periodic rolls.

In September 1990, OWCP referred appellant to a vocational rehabilitation counselor, who was asked to locate a suitable job for appellant.

In a work restriction evaluation form dated November 25, 1991, Dr. Albert H. Belfie, an osteopath and appellant's treating physician, indicated that he was capable of working eight hours a day with the following restrictions: intermittent sitting, standing and walking for no more than four hours a day; and intermittent lifting not exceeding 10 pounds for no more than one hour a day.

By letter dated February 5, 1992, the employing establishment offered appellant a job as a modified manual distribution clerk based on the restrictions set forth by Dr. Belfie, his attending physician. The job entailed separating incoming and outgoing mail in a postal facility, with miscellaneous clerk duties to be assigned in accordance with his restrictions.

On February 20, 1992 OWCP's medical adviser reviewed Dr. Belfie's work restrictions and the modified job description and found that the offered position was reasonable and medically suitable.

By letter dated February 21, 1992, OWCP advised the claimant that the offered position was suitable, advised the claimant of the sanctions for refusal of suitable work and allowed appellant 30 days to reply.

On February 14 and March 20, 1992 appellant declined the offered position, contending that he believed he could not perform the duties of the position due to limitations stemming from his accepted work injury. He submitted a March 2, 1992 report from Dr. Belfie, who advised that he had been treating appellant for low back pain syndrome stemming from his accepted employment injury. Dr. Belfie stated that he had exhausted all known options for diagnosis and treatment of appellant's chronic pain problem and that he had nothing further to offer him.

In a March 19, 1992 report, Dr. Carl S. Jenkins, a specialist in orthopedic surgery, advised that his examination was cut short because appellant was desperate and in "a paranoid state" because he believed "the system was against him." He opined that appellant was in no mental condition to return to a work situation. Dr. Jenkins recommended a continuation of appellant's disability for a three-month period to maintain treatment of his failed back syndrome, along with some modification of his "industrial induced mental paranoia and defensive attitudinal complex which might make job situations intolerable."

By decision dated April 27, 1992, OWCP terminated appellant on the grounds that he refused an offer of suitable employment. It found that he failed to submit medical evidence sufficient to establish that he was unable to perform the offered position and that therefore his refusal of the position was not justified.

By letter dated May 22, 1992, appellant's attorney requested an oral hearing, which was held on September 29, 1992. At the hearing appellant testified that he was experiencing pain from his accepted lower back conditions which prevented him from performing the duties of the offered position. He acknowledged that the modified job was tailored to the work restrictions set forth by his treating physician, Dr. Belfie, who stated, however, that appellant could not perform the position because it was located in Dayton, which was a 30-minute drive from his home and driving would aggravate his lower back condition. Appellant also asserted that he had a history of being unable to work a night shift, which had an adverse effect on his emotional state.

By decision dated November 30, 1992, OWCP's hearing representative affirmed the April 27, 1992 decision. In an August 11, 1994 decision, the Board set aside OWCP's April 27 and November 30, 1992 decisions, finding that OWCP failed to notify appellant that he had 15 days to accept the modified job offer before finding that his refusal to accept the job offer was unjustified.

On October 21, 1994 the employing establishment reissued the job offer for modified manual distribution clerk.

By letter dated October 21, 1994, OWCP advised appellant that the modified manual distribution job was suitable and that, pursuant to section 8106(c)(2), he had 15 days to either accept the job or provide a reasonable explanation for refusing the offer; otherwise his entitlement to compensation benefits would be terminated. Appellant did not respond to the offer.

By decision dated November 14, 1994, OWCP terminated appellant's compensation benefits on the grounds that he refused an offer of suitable work. It found that the position offered by the employing establishment was within his treating physician's prescribed work restrictions and credited the opinion of OWCP's medical adviser that he was capable of performing the position. OWCP also noted that appellant had been afforded the requisite 15-day notice and opportunity to comply with 5 U.S.C. 8106(c).

On October 29, 2003 OWCP accepted the condition of exacerbation of depressive disorder.

By decisions dated October 1, 2002, April 30, June 28, 2004, January 24, June 7, 2005, November 9, 2006, October 18, 2007, November 14, 2008 and February 17, 2010, OWCP denied appellant's requests to modify the November 14, 1994 termination decision. This determination was upheld by the Board.

In a January 22, 2009 report, Dr. Stephen D. Watson, a Board-certified anesthesiologist and pain management specialist, indicated that appellant experienced lower back pain caused by lumbar disc dislocation, which stemmed from his December 1987 work injury. He stated findings on examination and rated appellant's pain as a 5 on a scale of 1 to 10. Appellant had a moderate functional impairment which was present only when it interfered with some daily activities. Dr. Watson stated that appellant underwent a magnetic resonance imaging (MRI) scan on May 4, 2006 which showed a disc herniation at L4-5 and L5-S1 in the left lateral recess, causing moderate to marked left lateral recess stenosis. He also had psychiatric symptoms of

anxiety, depression and sleeplessness. Appellant currently had problems with intervertebral disc disorders in the lumbar region. Dr. Watson diagnosed myogenic pain secondary to muscle spasms, lumbar disc displacement and lumbar radiculopathy; he also noted a history of marijuana addiction/dependency.

In a report dated May 28, 2009, Dr. Kent A. Eichenauer, a specialist in psychiatry, advised that appellant requested a psychological evaluation to support his belief that the 1994 job offer was not suitable because it required him to work nights. Appellant asserted that his previous attempts to work the night shift were unsuccessful and, therefore, the job offer was not suitable. He contended that the employing establishment was determined to find a way to terminate his employment, that one of his coworkers spread false rumors about him and that an employing establishment physician was rude with him and physically pushed him back to his office.

Appellant related to Dr. Eichenauer that he began working at the employing establishment in 1981 managing a letter sorting machine from 10:00 p.m. to 6:30 a.m. He asserted that he was unable to function working this shift and experienced sleeplessness, irritability, mood swings and broke out in hives. Appellant also related that he began to use drugs, including marijuana and freebase cocaine, because of the depression he was experiencing; he told Dr. Eichenauer that drug use was one of the options suggested to him by coworkers working nights as their method of coping. He was voluntarily reassigned to the 5:00 p.m. to 1:30 a.m. shift but he still had attendance problems due to his physical problems, lack of sleep and drug use. Appellant sought treatment with Letitia Van Benten Ph.D., a clinical psychologist, and asserted that she wrote letters to the employing establishment recommending a day shift position. He began working the day shift as a letter carrier in October 1985 but began using drugs again, after one year of abstinence, because his emotional condition decompensated after his father died in October 1986. Appellant underwent outpatient chemical dependency treatment and was able to work full duty as a letter carrier until his December 1987 employment injury.

Dr. Eichenauer stated that, given this history, appellant believed he was incapable of functioning at the modified clerk job because it required him to work the 5:00 p.m. to 1:30 a.m. shift which had previously caused him physical, psychological and emotional damage. Therefore, his belief that the modified manual distribution clerk job was not suitable was reasonable.

On November 13, 2009 appellant requested reconsideration and submitted a statement. He stated that OWCP erred in its November 14, 1994 decision by failing to consider his emotional as well as his physical condition in finding that his refusal to accept the modified job offer was not justified. Appellant stated that the record contained a March 17, 1992 report from Dr. Van Benten which indicated that he required treatment to help him improve his mental stability, reduce his paranoid ideation and cope with anxiety, depression, sleep deprivation and loss of self-esteem stemming from his December 1987 employment injury. He contended that her report, together with Dr. Jenkins' March 1992 report, established that he was emotionally unable to perform the modified manual distribution clerk. Appellant also asserted that in June 19, 1991 a chronic pain center indicated that he was experiencing a moderate degree of depression. He stated that a September 26, 1991 rehabilitation report demonstrated that his state of mind at the employing establishment evolved from pleasant and cooperative in 1990 to violent

and requiring psychological intervention in September 1991. Appellant also advised that he told his vocational rehabilitation counselor that he was not medically able to work a night shift. Lastly, he argued that OWCP erred in finding Dr. Belfie was his treating physician; he stated that he had stopped treating with Dr. Belfie in 1991 and that when the job was offered in 1994, Dr. Jenkins and Dr. Van Benten were his physicians of record.

In an order dated July 25, 2011, the Board set aside the February 17, 2010 decision, finding that OWCP failed to consider the reports from Drs. Watson and Eichenauer. The Board therefore remanded the case to OWCP to enable it to properly consider all the evidence he submitted prior to the issuance of the February 17, 2010 decision.

By decision dated August 15, 2011, OWCP denied modification of the November 14, 1994 decision.[2]

On September 6, 2011 counsel requested an oral hearing.

By decision dated September 27, 2011, OWCP denied appellant's hearing request on the grounds that he had previously requested reconsideration and was not entitled to a hearing as a matter of right. It exercised its discretion and determined that the issue in the case could be addressed equally well through a reconsideration request and the submission of new evidence.

LEGAL PRECEDENT -- ISSUE 1

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."[3] It is OWCP's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[4] 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.[5] 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.[6] In determining what constitutes "suitable work" for a particular disabled employee, OWCP 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.[7] Section 8106(c) will be

[2] OWCP noted that appellant had filed another claim in 1997, case File No. xxxxxx822, for an emotional condition due to factors of his employment beginning on or about 1983. This claim was denied as untimely filed.

[3] 5 U.S.C. § 8106(c).

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

[5] 20 C.F.R. § 10.517(a).

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

[7] 20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB 681 (2004).

narrowly construed as it serves as a penalty provision which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[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] It is well established that OWCP must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.[10]

ANALYSIS -- ISSUE 1

OWCP terminated appellant's monetary compensation effective November 14, 1994 on the grounds that he refused an October 21, 1994 offer of suitable work. It found that the weight of the medical evidence established that the modified manual distribution clerk position was within the physical restrictions outlined by his treating physician, Dr. Belfie; these restrictions were part of the initial February 5, 1992 job offer. In addition, OWCP stated that a copy of the job description of the offered position had been forwarded to OWCP's medical adviser for his review. The position description described the duties and physical requirements of the offered position, and the medical adviser had indicated that the offered position was reasonable and acceptable. While appellant asserted that pain from his accepted lower back condition would prevent him from performing the position, he submitted no evidence sufficient to establish that he was unable to perform the duties of the job. Dr. Belfie merely stated in his March 2, 1992 report that he had been treating appellant for chronic low back pain syndrome stemming from his accepted employment injury and that he had exhausted all options for diagnosis and treatment of appellant's condition.

In his March 19, 1992 report, Dr. Jenkins advised that appellant was in no mental condition to return to work because of his failed back syndrome and his work-related paranoia. However, he provided no analysis or medical rationale of how these conditions prevented appellant from accepting the modified job offer. While appellant did testify at the 1992 hearing that he could not accept the position because he did not believe that he could drive 30 minutes to the jobsite and that he was not able to work nights based on his past history, he submitted no medical evidence to support these assertions. OWCP properly determined that the job it offered him on October 21, 1994 was suitable and within his physical capabilities.

After OWCP established that the offered work was suitable, the burden shifted to appellant to show that her refusal was reasonable or justified.[11] Appellant argued in his November 19, 2009 statement that OWCP failed to consider his emotional inability to work nights in its November 14, 1994 decision. As noted above, however, Dr. Jenkins' 1992 report was not sufficient to establish that the position was not suitable. The reports from Dr. Van Benten which appellant referenced are not contained in the instant record. Appellant also

[8] *Gloria G. Godfrey*, 52 ECAB 486 (2001).

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

[10] *Richard P. Cortes*, 56 ECAB 200 (2004).

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

submitted a May 28, 2009 report from Dr. Eichenauer, who reviewed appellant's work history and opined that the 1994 job offer was not suitable because it required him to work nights. Dr. Eichenauer related appellant's contention that his 1981 job working the 10:00 p.m. to 6:30 a.m. shift resulted in sleeplessness, irritability, mood swings and a skin condition. He stated that appellant began to use marijuana and freebase cocaine to cope with his depression issues. Although appellant subsequently was transferred to the 5:00 p.m. to 1:30 a.m. shift he asserted that he still experienced attendance problems, physical problems, difficulty with management and coworkers, lack of sleep and drug use. He asserted that his physical and emotional conditions and drug use were not ameliorated until he began working the day shift as a letter carrier in October 1985. Based on this history, Dr. Eichenauer related that appellant believed he was incapable of performing the modified clerk job because it required him to work the 5:00 p.m. to 1:30 a.m. shift which had previously caused him physical, psychological and emotional harm. Lastly, appellant submitted the January 22, 2009 report from Dr. Watson, who related that appellant was experiencing low back pain caused by lumbar disc dislocation stemming from the December 1987 employment injury. Dr. Watson also noted that appellant had psychiatric symptoms of anxiety, depression and sleeplessness, with a history of marijuana addiction and dependency.

The Board finds that the reports from Drs. Eichenauer and Watson are insufficient to establish that the offered position was unsuitable because they did not contain a probative, rationalized medical opinion explaining why appellant could not perform the duties of the modified position.[12] Dr. Eichenauer based his opinion that appellant was incapable of performing the 5:00 p.m. to 1:30 a.m. shift on the summarized history appellant provided regarding his alleged difficulties with the 1981 night shift assignment. This summary is not supported by any documentation in the record; nor is it substantiated by corroborating witnesses.[13] Thus it is unclear as to whether Dr. Eichenauer's opinion was based on an accurate history.[14] Dr. Watson's report does not contain any opinion regarding appellant's ability to work. Further, neither of these opinions were rendered contemporaneous with the 1994 job offer.

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.[15] The medical evidence appellant submitted fails to establish that his refusal to accept the 1994 modified job offer was reasonable or justified. Accordingly appellant has failed to meet his burden to provide evidence sufficient to warrant modification of the November 14, 1994 termination decision. 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.

[12] *S.S.*, 59 ECAB 315 (2008).

[13] The Board notes that appellant's references to alleged findings of an emotional condition on the part of the vocational counselor and a pain management clinic do not constitute medical evidence under section 8101(2).

[14] *See Geraldine H. Johnson*, 44 ECAB 745 (1993).

[15] 5 U.S.C. § 8106(c)(2).

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA provides that a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary.[16] Section 10.615 of the federal regulations implementing this section of FECA provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record.[17] The request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought.[18] A hearing is a review of an adverse decision by an OWCP hearing representative. Initially, the claimant can choose between two formats an oral hearing or a review of the written record. In addition to the evidence of record, the claimant may submit new evidence to the hearing representative.[19] A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which the hearing is sought.[20] A claimant is not entitled to a hearing or a review of the written record if the request is not made within 30 days of the date of the decision.[21] OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.[22] In such a case, it will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.[23]

While a claimant may not be entitled to a hearing or review of the written record as a matter of right if the request is untimely, OWCP has the discretionary authority to grant the request and must properly exercise such discretion.[24]

ANALYSIS -- ISSUE 2

On September 6, 2011 appellant requested an oral hearing and a review of the written record. Because he had previously requested reconsideration under section 8128 of FECA, he was not entitled to a hearing as a matter of right under section 8124(b)(1). OWCP exercised its discretion and determined that the issue in the case could be pursued equally well through a request for reconsideration and the submission of additional evidence. The Board finds that

[16] *Id*. at § 8124(b)(1).

[17] 20 C.F.R. § 10.615.

[18] *Id.* at § 10.616(a).

[19] *Supra* note 17.

[20] *Supra* note 18.

[21] *James Smith*, 53 ECAB 188 (2001).

[22] 20 C.F.R. § 10.616(b).

[23] *James Smith, supra* note 21.

[24] *See id.; Cora L. Falcon*, 43 ECAB 915 (1992); *Mary B. Moss*; 40 ECAB 640 (1989); *Rudolph Bermann*, 26 ECAB 354 (1975).

OWCP did not abuse its discretion in denying appellant's request for an oral hearing in its September 27, 2011 decision.

CONCLUSION

The Board finds that OWCP properly terminated appellant's wage-loss compensation pursuant to 5 U.S.C. § 8106(a). The Board also finds that it did not abuse its discretion in denying appellant's request for an oral hearing.

ORDER

IT IS HEREBY ORDERED THAT the September 27 and August 15, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 25, 2012
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