United States Department of Labor
Employees' Compensation Appeals Board

T.B., Appellant	)	
and	)	**Docket No. 12-866**
	)	**Issued: September 25, 2012**
U.S. CUSTOMS SERVICE, OFFICE OF INVESTIGATIONS, New York, NY, Employer	)	

Appearances:
Thomas Harkins, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 13, 2012 appellant, through his attorney, filed a timely appeal from a December 16, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 met its burden of proof to terminate compensation for wage loss effective September 29, 2010 pursuant to 5 U.S.C. § 8106(c)(2) on the grounds that appellant refused an offer of suitable work.

FACTUAL HISTORY

On May 8, 2002 appellant, then a 49-year-old special agent, filed a traumatic injury claim (Form CA-1) alleging that he sustained a right calf injury on that date while pushing an

[1] 5 U.S.C. § 8101 *et seq.*

employing establishment motor vehicle off the road. The reverse of the claim form indicated that he stopped working on May 8, 2002. On May 22, 2002 OWCP accepted the claim for a right calf muscle sprain. In a magnetic resonance imaging (MRI) scan report dated May 23, 2002, Dr. Alan Greenfield, a radiologist, diagnosed a tear of the distal aspect of the medial head of the gastrocnemius tendon.

Appellant remained off work and continued to receive compensation for wage loss. Dr. Henry Marano, the treating Board-certified orthopedic surgeon, submitted periodic treatment notes. OWCP referred appellant for a second opinion evaluation to Dr. Andrew Weiss, a Board-certified orthopedic surgeon. In a report dated June 2, 2005, Dr. Weiss provided a history and results on examination. He diagnosed a tear of the gastrocnemius tendon causally related to the May 8, 2002 employment injury, by appellant's history. Dr. Weiss opined that, based on his examination, appellant's condition had resolved and he was able to return to his former employment. In a treatment note dated April 19, 2007, Dr. Marano stated that appellant still had obvious atrophy and deformity to his right gastrocnemius muscle. He indicated that appellant had a permanent partial disability.

OWCP again referred appellant for a second opinion evaluation. In a report dated May 8, 2008, Dr. Michael Katz, a Board-certified orthopedic surgeon, provided a history and results on examination. He diagnosed status post right gastrocnemius tear. Dr. Katz stated that there was a degree of partial disability related to the work injury. In an addendum, he indicated that he had reviewed a June 11, 2008 electromyogram (EMG), showing chronic lumbar L4-5 and L5-S1 radiculopathy. Dr. Katz stated there was no further treatment needed for the right gastrocnemius and appellant had reached maximum medical improvement with respect to this injury. He opined that appellant could work with restrictions of 20-pound lifting, with limited standing, stooping and bending.

In a report dated May 28, 2009, Dr. Marano stated that appellant was seen for his annual examination. He provided results on examination, and diagnosed chronic medial gastrocnemius tear with atrophy to the right leg. Dr. Marano stated that appellant had a permanent partial disability, with no prolonged sitting, standing, walking, climbing, kneeling or pushing.

OWCP determined that a conflict in the medical evidence existed and selected Dr. Sanford Wert, a Board-certified orthopedic surgeon, as a referee physician. In a report dated December 27, 2009, Dr. Wert provided a history, review of medical records and results on examination. He indicated in his history that appellant had a 1984 lumbar injury. Dr. Wert opined that appellant had a permanent mild partial disability, based on a positive Thompson's test exhibited on clinical examination, diminished muscle strength of the right lower extremity in conjunction with the right leg MRI scan findings of tear of the medial head of the gastrocnemius tendon. He also stated that the May 8, 2002 injury had aggravated the prior lumbar condition due to an altered gait, but the current back examination was within normal limits and the aggravation had resolved. Dr. Wert completed a work capacity evaluation (OWCP-5c) indicating appellant could work eight hours with restrictions. The specific restrictions were four hours walking, standing and squatting and one hour kneeling and climbing.

By letter dated June 1, 2010, the employing establishment offered appellant a position as an investigative assistant. It noted that Dr. Wert had provided work restrictions and included a

job description of the offered position. The investigative assistant position was described as a sedentary position, which may involve some walking, standing, bending and carrying of light items such as papers or books.

In a letter dated June 16, 2010, OWCP advised appellant that it found the offered position to be a suitable job. Appellant was advised that, under 5 U.S.C. § 8106(c)(2), an employee who refuses an offer of suitable work is not entitled to compensation for wage loss. OWCP stated that, if he did not accept the position, he must provide written explanation within 30 days.

By letter dated July 12, 2010, appellant, through his representative, stated that he was unable to perform the duties of the offered position. He submitted a report dated June 4, 2010 from Dr. Marano, who stated that appellant had right hip and groin pain from an altered gait and the symptoms were worsening. Dr. Marano provided results on examination.

In a letter dated August 2, 2010, OWCP advised appellant that the reasons offered for declining the position were insufficient and the job remained suitable. Appellant was advised to accept the position within 15 days or his compensation for wage loss would be terminated.

By decision dated September 29, 2010, OWCP terminated compensation for wage loss on the grounds appellant had refused an offer of suitable work. It found Dr. Wert represented the weight of the medical evidence.

In a letter dated September 22, 2011, appellant requested reconsideration. He argued that Dr. Wert's opinion was not based on a complete history, as the only accepted injury was reported as the right calf sprain. Appellant submitted a November 17, 2010 report from Dr. Marano, who reviewed appellant's medical history. Dr. Marano stated that appellant was last seen on June 4, 2010 with an antalgic limping gate and at that time remained disabled from his occupation.

By decision dated December 16, 2011, OWCP reviewed the case on its merits. It denied modification of the suitable work termination.

LEGAL PRECEDENT

Section 8106(c) 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." It is OWCP's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[2] To justify such a termination, OWCP must show that the work offered was suitable.[3] 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.[4]

With respect to the procedural requirements of termination under 5 U.S.C. § 8106(c), the Board has held that OWCP must inform appellant of the consequences of refusal to accept

[2] *Henry P. Gilmore*, 46 ECAB 709 (1995).

[3] *John E. Lemker*, 45 ECAB 258 (1993).

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

suitable work, and allow him an opportunity to provide reasons for refusing the offered position.[5] If appellant presents reasons for refusing the offered position, OWCP must inform the employee if it finds the reasons inadequate to justify the refusal of the offered position and afford appellant a final opportunity to accept the position.[6]

FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make the examination.[7] The implementing regulations state that if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[8]

It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[9]

ANALYSIS

In the present case, OWCP found that the offered position of investigative assistant was medically suitable. Appellant argued that he could not physically perform the offered position. With respect to his work restrictions, there was a conflict in the medical evidence as to the specific restrictions. The second opinion physician, Dr. Katz, indicated that appellant was limited only in standing, stooping and bending, with a 20-pound lifting restriction. Attending Physician Dr. Marano offered further restrictions, including restrictions of prolonged sitting, standing, walking, climbing, kneeling and pushing.

To resolve the issue as to the specific work restrictions, Dr. Wert was selected as a referee physician. His report provided a detailed history and results on examination. Dr. Wert noted that appellant had sustained a gastrocnemius tendon tear and also noted an aggravation of a prior lumbar condition that had resolved. He provided specific work restrictions limiting appellant to four hours a day of walking, standing and squatting and one hour of kneeling and climbing. The Board finds Dr. Wert's report is entitled to special weight and represents the weight of the medical evidence.

Prior to the September 29, 2010 decision, appellant submitted a June 4, 2010 report from Dr. Marano, stating that appellant had worsening symptoms. He did not address the offered

[5] *Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).

[6] *Id.*

[7] 5 U.S.C. § 8123.

[8] 20 C.F.R. § 10.321 (1999).

[9] *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

position. The Board notes that Dr. Marano was on one side of the conflict created and resolved pursuant to 5 U.S.C. § 8123(a) and his additional report does not create a new conflict. Additional reports from a physician on one side of the conflict that is properly resolved by a referee are generally insufficient overcome the weight accorded the referee's report or create a new conflict.[10]

The next question is whether the offered position was within the stated work restrictions. The offered position of investigative assistant was described as a sedentary position, with occasional standing, walking and light lifting. The evidence indicates that the offered position was within the restrictions offered by Dr. Wert and appellant does not offer any contrary argument.

Having found that the position offered was medically suitable, the Board will consider whether the procedural requirements of 5 U.S.C. § 8106(c)(2) were met. In this regard, OWCP sent appellant notification that the position offered was found to be suitable and advised him of the provisions of 5 U.S.C. § 8106(c)(2). Appellant submitted additional evidence, which was considered by OWCP and found to be insufficient, and he was provided an additional 15 days to accept the position. The Board finds OWCP properly adhered to the procedural requirements of termination under 5 U.S.C. § 8106(c)(2).

On appeal, appellant argues that Dr. Wert did not have an adequate background because the statement of accepted facts only reported the accepted condition as a right calf sprain, while there were other conditions that should have been accepted. The Board notes that the only condition accepted by OWCP was the right calf sprain. However in evaluation of suitability of an offered position, OWCP procedures as well as Board precedent require that not only employment related, but also preexisting and subsequently acquired conditions be considered as part of the suitability evaluation.[11] Dr. Wert clearly considered the gastrocnemius tear, discussing the medical history of the condition and basing the work restrictions on residuals of the gastrocnemius tear. He also found there was an aggravation of a lumbar condition that had resolved. With regards to Dr. Wert's factual and medical background, there is no indication that he was unaware of any relevant condition. The December 27, 2009 report was based on a complete background and the current examination results and there is no evidence that his report was of diminished probative value.

Appellant also argued that the November 17, 2010 report from Dr. Marano shows that appellant could not perform the position. In this report, Dr. Marano reviews the medical history and states that appellant could not perform "his occupation." He did not discuss the offered position. As noted above, Dr. Marano was on one side of the conflict resolved by Dr. Wert. The November 17, 2010 report is not sufficient to create a new conflict.

For the above reasons, the Board finds that OWCP properly terminated appellant's compensation on the grounds that he refused an offer of suitable work. Appellant may submit

[10] *See Harrison Combs, Jr.*, 45 ECAB 716 (1994); *Dorothy Sidwell*, 41 ECAB 857 (1990).

[11] *Richard P. Cortes*, 56 ECAB 200 (2004); *Gayle Harris*, 52 ECAB 319 (2001).

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 met its burden of proof to terminate compensation for wage loss effective September 29, 2010 on the grounds that appellant refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 16, 2011 is affirmed.

Issued: September 25, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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