

OWCP accepted for lumbar strain and herniated disc. He was paid compensation for temporary total disability and placed on the periodic rolls.

In September 1990 OWCP referred appellant to a vocational rehabilitation counselor. In a report dated October 27, 1990, the counselor noted appellant's federal employment history. She related that appellant began his postal employment in August 1981 working as a letter sorting machine operator; however, in 1985 a psychologist concluded that working the night shift was too stressful for him. Appellant was laid off, but then returned to work the day shift as a letter carrier in 1985 or 1986.

By letter dated February 5, 1992, the employing establishment offered appellant a job as a modified manual distribution clerk based on physical restrictions set forth by Dr. Albert H. Belfie, an osteopath and appellant's treating physician. The job required appellant to work from 5:00 p.m. to 1:30 a.m. By letter dated February 21, 1992, OWCP advised appellant that the offered position was suitable, advised him of the sanctions for refusal of suitable work, and allowed appellant 30 days to reply.

In a March 17, 1992 report, Dr. Letitia Van Benten, a Ph.D. in clinical psychology, stated that she initially treated appellant in 1985 for symptoms of suspiciousness, agitation, depression, and paranoid ideation. She asserted that he was having trouble getting along with others in the workplace and was overreacting to actual or perceived criticism of his performance. Dr. Van Benten advised that appellant working nights and more than 40 hours per week was creating a situation that was too stressful for him and that he was decompensating. She stated that the 1987 work injury created a great deal of stress due to limitation of movement which made it impossible for appellant to engage in many physical activities; the pain, anxiety, and increased stress resulting from the injury brought on paranoia symptoms, including agitation, delusional thinking and loss of mental efficiency. Dr. Van Benten diagnosed affective disorder, depression; paranoid state.

On March 20, 1992 OWCP received a March 19, 1992 report from Dr. Carl S. Jenkins, a specialist in orthopedic surgery. In this report, Dr. Jenkins noted that he had examined appellant on February 19, 1992 for back pain. He related appellant's findings of limp on the left side, mild left spasm of the lumbosacral area, genuflexion, and symptoms of lumbosacral failed back syndrome. Dr. Jenkins related that his examination was cut short by appellant's demeanor, as he appeared to be in a paranoid state. He concluded that appellant was in no mental condition to return to work, especially if his work was nocturnal, and recommended referral for a psychological evaluation.

On March 20, 1992 appellant declined the offered modified manual distribution on clerk position, indicating that he believed he could not perform the duties of the position due to limitations stemming from his accepted work injury and referred to other letters that had previously been submitted by his physicians.

By decision dated April 27, 1992, OWCP terminated appellant's compensation as he refused an offer of suitable employment. It found that he had 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 asserted that following the 1987 back injury he did not receive proper treatment for his back condition, which caused his mental condition to deteriorate. He stated that the employing establishment repeatedly pressured him to complete a work limitation form and accept a modified job offer, despite the fact that he was not capable of performing the position. Appellant stated that he was offered a job working from 5:30 p.m. to 1:30 a.m. which required him to case letters. He advised that the only difference between that job and other jobs they offered was that he was provided with a regular chair to sit in instead of a stool; he stated, however, that the nature of the job was not the problem. Appellant asserted that he was not able to work for 8 hours and, more significantly, the site of the proposed job was located 30 minutes from his home. This conflicted with his treating physician's restriction which prohibited him from taking long rides. Appellant stated that the employing establishment ignored this fact and the fact that he told Dr. Belfie in 1984 that he had almost "lost it mentally" because of working nights. He advised that he was unable to work nights because it caused him mental stress; he stated that this was supported by Dr. Van Benten's report. Appellant indicated that management told him that he was medically able to work nights but simply did not want to do so.

By decision dated November 30, 1992, an OWCP hearing representative affirmed the April 27, 1992 decision.

In a February 26, 1993 report, Dr. Jenkins stated that he had not seen appellant since Dr. Van Benten diagnosed effective disorder depression, paranoid state, but that he did not think that as of his last examination he was ready to return to a work situation. In a March 23, 1993 report, Dr. Van Benten advised that appellant had always experienced difficulty functioning while working the night shift since she first examined him in 1984. She stated that it was well documented that individuals diagnosed with paranoid state or other major mental-illnesses such as bipolar disorders, manic depression, and various types of paranoid psychotic disorders are aggravated and frequently precipitated when the patient is sleep deprived. Dr. Van Benten opined that, when appellant was in a work situation that created more stress than he could tolerate, especially when it was aggravated by sleep deprivation, he became mentally decompensated and engaged in paranoid thinking.

In an August 11, 1994 decision,² the Board set aside OWCP's April 27 and November 30, 1992 decisions on procedural grounds, finding that it failed to send appellant the obligatory letter notifying him that he had 15 additional days to accept the modified job offer after finding that his refusal to accept the employing establishment's job offer was unjustified.

On October 21, 1994 the employing establishment reissued the job offer for modified manual distribution clerk. The tour of duty was again noted to be from 5:00 p.m. until 1:30 a.m. By letter dated October 21, 1994, OWCP advised appellant that the offered modified manual

² Docket No. 93-1117 (issued August 11, 1994).

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 the prescribed work restrictions of Dr. Belfie, his treating physician, and that the report from Dr. Jenkins was of limited probative value because his examination of appellant had been cut short. OWCP also noted that appellant had been afforded the requisite 15-day notice and opportunity to comply with 5 U.S.C. § 8106(c).

Appellant continued to request that OWCP reconsider the termination of his wage-loss benefits. On October 29, 2003 OWCP accepted the condition of exacerbation of depressive disorder.

By decisions dated October 1, 2002, June 28, 2004, January 24 and 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. The Board affirmed those OWCP decisions on January 24, 2005,³ November 9, 2006,⁴ and November 14, 2008.⁵

Appellant subsequently submitted a January 22, 2009 report from Dr. Stephen D. Watson, a Board-certified anesthesiologist and pain management specialist, and a May 28, 2009 report from Dr. Kent A. Eichenauer, a specialist in psychiatry, in support of his contention that the employing establishment's 1994 job offer was not suitable. He requested reconsideration and submitted a narrative statement received on November 19, 2009, arguing 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 the March 17, 1992 report from Dr. Van Benten, a Ph.D. in clinical psychology, 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 Dr. Van Benten's reports, together with Dr. Jenkins' 1992 report, established that he was emotionally unable to perform the modified manual distribution clerk position with night hours. Dr. Van Benten also argued that OWCP erred in finding that Dr. Belfie was his treating physician. Appellant 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.

³ Docket No. 04-2020 (issued January 24, 2005). The Board found that appellant's request for reconsideration was not timely filed and did not establish clear evidence of error.

⁴ Docket No. 05-1581 (issued November 9, 2006). The Board found that appellant's request for reconsideration was not timely filed and did not establish clear evidence of error.

⁵ Docket No. 08-550 (issued November 14, 2008). The Board found that appellant's request for reconsideration was not timely filed and did not establish clear evidence of error.

By decision dated February 17, 2010, OWCP conducted a merit review of the case and found that there was no evidence on file to suggest that any emotional condition became apparent until after OWCP's November 14, 1994 termination decision. It found that, as there was no contemporaneous evidence to establish that the 1994 job offer was unsuitable, the evidence submitted in support of this request for reconsideration was insufficient to warrant modification of the prior decision.

By order dated July 25, 2011,⁶ the Board set aside the February 17, 2010 decision, finding that OWCP failed to consider the January 22, 2009 report from Dr. Watson. 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. By decision dated September 27, 2011, it 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. In an October 25, 2012 decision,⁷ the Board affirmed OWCP's August 15 and September 27, 2011 decisions. The complete facts of this case are set forth in the Board's October 25, 2012 decision and are herein incorporated by reference.

Appellant continued to submit medical evidence to the record. On October 25, 2013 OWCP received a January 8, 1993 report from Dr. Belfie who stated that during a January 7, 1993 telephone conversation with appellant, he asked him to write a letter stating that they had discussed appellant having problems working midnights. Dr. Belfie advised that he did recall appellant mentioning that he had some trouble working midnights but that they did not discuss the subject any further. In a report dated May 17, 2005, Dr. H. Owen Ward, a Ph.D. in clinical psychology, stated that appellant's medical records indicated that he had suffered from severe mental illness and that his level of depression was severe with psychotic features. He advised that his mental illness appeared to result from perceived mistreatment on the job; he believed that management discriminated against him due to his disability and that they were plotting against him. Dr. Ward stated that, if appellant was suffering from severe depression with aggressive and paranoid mentation, together with severe physical pain, this would have made his work difficult, especially since he was also losing sleep while working the night shift. Given this history and the nature of appellant's condition, he opined that he would not have found management's job offer suitable. Dr. Ward stated:

“Individuals with major depression commonly become agitated and cannot sleep, and as a result are apt to decompensate into a more severe level of depression. It seems that this is what was happening to [appellant]. In this regard I have also my own records indicating that his depression impaired his ability to sleep. Many individuals with this level of symptomatology do not manage stress on the job well and have difficulty sleeping which in turn exacerbates their symptomatology. Add to this the feeling of mistreatment and harassment on the job, and the paranoia that had developed in his condition primarily based on the perception of

⁶ Docket No. 10-2161 (issued July 25, 2011).

⁷ Docket No. 12-339 (issued October 25, 2012).

discriminatory practices, and add to this, his chronic pain condition, the alienation he felt from the company doctor, his use of street drugs to compensate for his failing mental health that no doubt contributed to his paranoia and we have multiple factors that would preclude his capacity to work a night shift position.”

Dr. Ward reiterated that his opinion was based on a retrospective review of appellant’s medical and work history. He stated that his conclusion about his competency to work a night shift position in 1992 and 1994 was based on his clinical presentation, the psychological and medical records and conjecture and did not constitute an independent opinion. Appellant also resubmitted Dr. Van Benten’s March 17, 1992 report.

By letter dated October 16, 2013, appellant requested reconsideration. He argued that OWCP failed to consider factual and medical evidence indicating that working the night shift worsened his physical and emotional conditions and rendered him unable to accept management’s February 1992 job offer and essentially reiterated his previous contentions. Appellant reiterated that OWCP failed to consider his emotional inability to work nights in its November 14, 1994 decision. In support of this request for reconsideration, he submitted routing slips from the employing establishment dated December 13, 1984 and January 25, 1985 in which Dr. Jack L. Colglazier, a specialist in occupational medicine, related that appellant was requesting a work schedule change as he was unable to function except on the day shift. Appellant also submitted a January 4, 1985 PS Form 2485, which he had signed, in which he noted that he had been previously refused employment or been unable to hold a job due to inability to work the night shift because of emotional stress and physical stress.

By decision dated January 17, 2014, OWCP denied modification of the November 14, 1994 termination decision.⁸

LEGAL PRECEDENT

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.”⁹ OWCP has the burden of proof when terminating compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.¹⁰ 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.¹¹ To justify termination, OWCP must show that the work offered was suitable and that appellant was informed of the consequences of

⁸ OWCP noted that appellant had filed another claim in 1997, case number xxxxxx822, for an emotional condition due to factors of his employment beginning on or about 1983. This claim was denied as untimely filed.

⁹ 5 U.S.C. § 8106(c).

¹⁰ *Joyce M. Doll*, 53 ECAB 790 (2002).

¹¹ 20 C.F.R. § 10.517(a).

his refusal to accept such employment.¹² 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.¹³ Section 8106(c) will be narrowly construed as it serves as a penalty provision which may bar an employee’s entitlement to future compensation.¹⁴

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.¹⁵ It is well established that OWCP must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.¹⁶ All of appellant’s medical conditions, whether work related or not, must be considered in assessing the suitability of the position.¹⁷

ANALYSIS

OWCP terminated appellant’s monetary compensation effective November 14, 1994 because 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 Dr. Belfie’s physical restrictions, as set forth in the February 5, 1992 job offer. However, in her March 23, 1993 report, Dr. Van Benten expounded on the opinions she expressed in her March 17, 1992 report, in which she diagnosed affective disorder, depression, paranoid state and advised that appellant’s 1987 work injury resulted in anxiety, stress, paranoia symptoms, and loss of mental efficiency. As noted above, OWCP must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.¹⁸ Dr. Van Benten’s March 1993 reports, which were in the record and submitted prior to OWCP’s November 14, 1994 termination decision, were not considered by OWCP prior to its decision. She reiterated that appellant had experienced difficulty functioning while working the night shift since she first examined him in 1984. Dr. Van Benten advised that when he was in a work situation that created more stress than he could tolerate, especially when it was aggravated by sleep deprivation, he became mentally decompensated and engaged in paranoid thinking; these issues created difficulties with coworkers and caused him to overreact to perceived criticism. In addition, Dr. Jenkins stated in his February 26, 1993 report that he did not believe appellant was

¹² *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff’d on recon.*, 43 ECAB 818 (1992).

¹³ 20 C.F.R. § 10.500(b); *see Ozone J. Hagan*, 55 ECAB 681 (2004).

¹⁴ *Gloria G. Godfrey*, 52 ECAB 486 (2001).

¹⁵ *Gayle Harris*, 52 ECAB 319 (2001).

¹⁶ *Richard P. Cortes*, 56 ECAB 200 (2004).

¹⁷ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (December 1993).

¹⁸ *See supra* note 16.

ready to return to a work situation as of his most recent examination. Dr. Ward's 2005 retrospective evaluation of the medical evidence of record as of 1994 also supported a finding that the position was not suitable, given appellant's depression and paranoid mentation. Finally, OWCP did not discuss or mention appellant's contention, discussed at length during the September 29, 1992 hearing, that he was unable to perform the modified position because he had a preexisting emotional condition dating back to 1984 which prevented him from working nights, making the position unsuitable.

Once appellant submitted this additional medical evidence indicating that he had greater restrictions than the physical restrictions upon which the modified manual distribution clerk position was based, OWCP was required to determine whether the offered position was still suitable. However, OWCP erroneously found in its November 14, 1994 decision and in several subsequent decisions that there was no contemporaneous evidence to establish that the 1994 job offer was unsuitable. It failed to consider the effects of appellant's emotional condition -- diagnosed and presented in Dr. Van Benten's 1993 reports, and discussed by other physicians of record -- in determining whether the position it offered to appellant was suitable.¹⁹ OWCP therefore did not meet its burden of proof in this case to terminate his compensation benefits pursuant to 5 U.S.C. § 8106.²⁰ Accordingly, the Board will reverse OWCP's January 17, 2014 decision.²¹

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation pursuant to 5 U.S.C. § 8106(a).

¹⁹ The Board notes that OWCP did subsequently accept a condition of exacerbation of depressive disorder in October 2003.

²⁰ *Barbara R. Bryant*, 47 ECAB 715 (1996).

²¹ *M.S.*, 58 ECAB 328 (2007).

ORDER

IT IS HEREBY ORDERED THAT the January 17, 2014 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 17, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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