

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

F.E., Appellant)	
)	
and)	Docket No. 15-1494
)	Issued: December 24, 2015
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Santa Clarita, CA, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 30, 2015 appellant, through counsel, filed a timely appeal from a June 3, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 appellant's wage-loss compensation and schedule award benefits under 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On August 18, 2010 appellant, then a 40-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that he sustained neck, arm, and knee injuries as a result of

¹ 5 U.S.C. § 8101 *et seq.*

his federal employment. The reverse of the claim form indicated that he had stopped working as of June 17, 2010. In an accompanying statement, appellant indicated that his job duties involved loading and unloading trucks. The medical evidence shows that he underwent a left elbow ulnar nerve release on June 25, 2010.

OWCP accepted the claim on October 7, 2010 for lesion of the left ulnar nerve. In addition, it has accepted a neck sprain, bilateral knee derangement, displacement of cervical intervertebral disc without myelopathy, and brachial neuritis or radiculitis.

Appellant remained off work and received treatment from Dr. Narinder Grewal, a Board-certified anesthesiologist. In a work capacity evaluation (Form OWCP-5c) dated October 4, 2012, Dr. Grewal provided work restrictions, which included three to four hours of sitting. The employing establishment offered appellant a part-time sedentary position on January 4, 2013. Appellant refused the offer on January 7, 2013, asserting that he could not physically perform the position.

On February 13, 2013 the employing establishment offered appellant a full-time position as a customer care agent. The physical requirements of the customer care agent were reported as sitting up to eight hours with some standing, simple grasping up to eight hours intermittently, pushing/pulling of a computer mouse up to eight hours, and fine manipulation using a keyboard up to eight hours. Appellant submitted a February 18, 2013 note from Dr. Grewal indicating that appellant could not perform the offered position.

OWCP prepared a statement of accepted facts (SOAF) dated April 4, 2013 and referred appellant to Dr. G.B. Ha'Eri, a Board-certified orthopedic surgeon, for a second opinion examination and opinion regarding work restrictions. In a report dated May 1, 2013, Dr. Ha'Eri provided a history and results on examination. With respect to the position of customer care agent, Dr. Ha'Eri opined that appellant was not capable of performing the position as he had to repeatedly use his hands eight hours per day with no breaks.

The record indicates that on May 28, 2013 appellant underwent an authorized C4-6 anterior microdiscectomy and interbody fusion surgery. In a toxicology report dated August 13, 2013, he tested positive for one prescription drug, Tapentadol, and for THC-COOH. The report indicated that the referring physician was Dr. Hrair Darakjian, a Board-certified orthopedic surgeon.

On December 24, 2013 OWCP prepared a new SOAF and again referred appellant to Dr. Ha'Eri for a second opinion examination. In a December 24, 2013 letter, the employing establishment discussed the offered position of customer care agent and asserted that appellant could sit or stand as needed for comfort, and there was no continuous typing.

In a report dated February 5, 2014, Dr. Ha'Eri provided a history and results on examination. He diagnosed left elbow cubital tunnel syndrome, bilateral knee patellofemoral stress syndrome, cervical sprain/strain, and aggravation of preexisting multilevel cervical degenerative disc disease and protrusions, giving rise to neck pain and upper extremity radiculopathies, left worse than right. Dr. Ha'Eri opined that the degenerative cervical condition was permanently aggravated by the employment injury. He indicated that the cervical surgery

had failed and appellant continued to have neck pain and stiffness associated with bilateral upper extremity radiculopathy. As to the offered position, Dr. Ha'Eri reported: "It is my opinion that the claimant is able to return to a sedentary work as long as he has 15-minute breaks every 2 hours. The job offer of customer care agent was reviewed and it seems a suitable position for him."

In a toxicology report dated March 17, 2014, appellant tested for positive for two nonprescribed substances: THC-COOH and 7-Aminoclonazepam. He did not test positive for any prescribed medications.

On March 28, 2014 the employing establishment offered appellant the full-time position of customer care agent. Appellant refused the job offer, indicating that it was not medically suitable.

Appellant submitted an April 3, 2014 report from Dr. Darakjian, who provided a history and results on examination, indicating that he had reviewed records, including the job of customer care agent. As to examination results, Dr. Darakjian noted spasm and tenderness of the cervical paraspinal muscles, with paresthesias in both hands involving C6 and C7 nerve distribution. He diagnosed status post cervical anterior interbody fusion with residual radiculopathy, and status post left cubital tunnel syndrome. Dr. Darakjian reported that appellant would continue to take pain medication, Nucynta (Tapentadol) and Neurontin (Gabapentin), and was currently managing his pain well with this medication. According to him, the medication made appellant drowsy, and he had difficulty sitting in one position more than 45 minutes at a time. Dr. Darakjian reported that appellant was not able to do repetitive movements, such as typing on a keyboard or using a computer mouse more than 15 minutes at a time. He concluded, "Based on my evaluation and review of records that have been provided to me, I am of the opinion that the patient is not capable of performing the duties of customer care agent for a call center due to the length of time needed to focus, sit, and use the hands to operate the computer. Dr. Darakjian remains totally disabled."

By letter dated April 18, 2014, OWCP advised appellant that it found the job offer of customer care agent suitable. It found that Dr. Ha'Eri represented the weight of the medical evidence. Appellant was advised of the provisions of 5 U.S.C. § 8106(c)(2) and further advised if he failed to accept the position he should provide written explanation of reasons within 30 days.

Appellant submitted a letter on May 8, 2014 in which he asserted that the SOAF was not entirely accurate as he was only a supervisor from 2004 to 2006 for a couple of months a year.² He again opined that the job offered was not medically suitable based on the evidence. The record contains a toxicology report dated May 12, 2014, indicating that appellant did not test positive for any prescribed medication. In a toxicology report dated June 5, 2014, appellant again did not test positive for any prescribed medication by Dr. Darakjian. The positive results were for Tramadol, Zolpidem, and 7 -- Aminoclonazepam.

² The December 24, 2013 SOAF had indicated that appellant worked as a supervisor in the year prior to his injury.

By letter dated June 27, 2014, OWCP advised appellant that the reasons for refusing the job offer were not acceptable. It advised him that he had an additional 15 days to accept the position or his entitlement to wage-loss compensation and schedule award benefits would be terminated.

On August 4, 2014 appellant submitted a July 3, 2014 report from Dr. Darakjian, who provided results on examination. Dr. Darakjian indicated that appellant reported persistent pain, with weakness in the hands. He reported that he was concerned that appellant's pain medications will make it difficult for him to focus, use a keyboard or watch a computer screen. Dr. Darakjian noted that he had found in his April 3, 2014 report that appellant could not perform the customer care agent position, and his opinion remained unchanged.

By decision dated July 16, 2014, OWCP terminated wage-loss compensation and entitlement to a schedule award effective July 16, 2014 pursuant to 5 U.S.C. § 8106(c)(2). It found Dr. Ha'Eri represented the weight of the medical evidence, as there was no evidence from a treating physician disputing his findings. With regard to medications, OWCP found that the toxicology reports dated May 12 and June 5, 2014 did not test positive for the prescribed medications. It also stated that there were August 13, 2013 and March 17, 2014 which were positive for THC-COOH, which was indicative of marijuana use, and Dr. Darakjian did not address this finding.

In a report dated August 28, 2014, Dr. Darakjian indicated that appellant continued to report neck pain. He stated that appellant reported that the prescribed medication of Nucynta and Gabapentin made him sleepy. Dr. Darakjian stated that appellant was disabled "as he is not able to do even the modified duties that have been provided to him due to the fact that he has difficulty with prolonged sitting, repetitive use of the hands, typing, focusing and concentrating on his work."

Appellant requested a telephone hearing with an OWCP hearing representative, which was held on March 18, 2015. At the hearing, he argued that the claim should be expanded to include a permanent aggravation of the cervical condition.

By decision dated June 3, 2015, the hearing representative affirmed the July 16, 2014 suitable work termination. The hearing representative found OWCP met its burden of proof to terminate compensation for refusal of suitable work.

LEGAL PRECEDENT

5 U.S.C. § 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.³ To justify such a termination, OWCP must show that the work offered was suitable.⁴ An employee who refuses or neglects to work

³ *Henry P. Gilmore*, 46 ECAB 709 (1995).

⁴ *John E. Lemker*, 45 ECAB 258 (1993).

after suitable work has been offered to him has the burden of showing that such refusal to work was justified.⁵

With respect to the procedural requirements of termination under section 8106(c), the Board has held that OWCP must inform appellant of the consequences of refusal to accept suitable work, and allow appellant an opportunity to provide reasons for refusing the offered position.⁶ 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.⁷

ANALYSIS

In the present case, the employing establishment offered appellant a full-time position as a customer care agent. The position was primarily sedentary, with computer keyboarding and the ability to stand as needed. The second opinion physician, Dr. Ha'Eri, found that appellant was capable of performing the duties of the position. In his February 5, 2014 report, he provided a complete factual and medical background. While Dr. Ha'Eri indicated that appellant had a degenerative cervical condition that was permanently aggravated by the employment injury, he reviewed the duties of the offered position and found appellant could perform the job. The Board notes that appellant had argued that the accepted conditions should include permanent aggravation of the cervical condition. As to whether an offered position is medically suitable, it is well established OWCP must consider preexisting and subsequently-acquired medical conditions, as well as employment-related conditions.⁸ The issue is not whether a condition is employment related or not, but whether appellant can perform the duties of the offered position. Dr. Ha'Eri provided an opinion that appellant could perform the position based on appellant's current condition.

Appellant submitted an April 3, 2014 report from Dr. Darakjian, who opined that appellant could not perform the job. Dr. Darakjian does not provide a rationalized medical opinion on the issue. Rationalized medical opinion evidence is medical evidence that is based on a complete factual and medical background, of reasonable medical certainty, and supported by medical rationale explaining the opinion.⁹ Dr. Darakjian refers to the prescribed pain medication and asserts that it made appellant drowsy. In this regard, he makes no mention of the toxicology reports that he had ordered in this case. The March 17, 2014 report, for example, did not show the presence of any prescription drugs, but did show other substances. Dr. Darakjian does not clearly explain his opinion in light of these findings, or otherwise provide a clear explanation as to why prescribed medication would prevent appellant from performing the offered position. As to the opinion that appellant could not physically perform the position, Dr. Darakjian provides no

⁵ *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.517(a).

⁶ *Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).

⁷ *Id.*

⁸ *Janice S. Hodges*, 52 ECAB 379 (2001).

⁹ *Jennifer Atkerson*, 55 ECAB 317, 319 (2004).

additional explanation or medical rationale. The position was a very light-duty, sedentary position that did not require continuous typing and would allow appellant to stand as necessary.

The Board finds that the weight of the medical evidence rests with Dr. Ha'Eri in this case. Dr. Ha'Eri provided a rationalized medical opinion based on a complete background that appellant could perform the duties of the offered position. The position of customer care agent was medically suitable based on the weight of the medical evidence.

OWCP followed its procedures and advised appellant that it found the job offer to be suitable, and provided appellant an opportunity to accept the position or provide valid reasons for refusing the position. In addition, it advised appellant of 5 U.S.C. § 8106(c)(2) and the consequences for refusing an offer of suitable work. Appellant provided a statement that he felt the SOAF had incorrectly identified the period he worked as a supervisor. The issue in the case was whether appellant currently had the ability to perform the duties of the selected position. Dr. Ha'Eri was provided a proper background for this issue and as noted above, provided a rationalized medical opinion on the issue. OWCP properly advised appellant that his reasons for refusing the offered position were not considered valid, and he had another 15 days to accept the position.

Following the July 16, 2014 suitable work termination, appellant submitted an August 28, 2014 report from Dr. Darakjian. Dr. Darakjian reiterates his opinion without providing additional medical rationale or remedying the deficiencies noted above in his April 3, 2014 report. The weight of the evidence, for the reasons discussed, remained with the second opinion physician, Dr. Ha'Eri.

Appellant may submit 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 OWCP met its burden of proof to terminate appellant's wage-loss compensation and schedule award benefits under 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 3, 2015 is affirmed.

Issued: December 24, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board