United States Department of Labor
Employees' Compensation Appeals Board

L.B., Appellant	)	
and	)	**Docket No. 14-1794**
	)	**Issued: January 7, 2015**
U.S. POSTAL SERVICE, POST OFFICE, Columbus, 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
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 11, 2014 appellant, through his attorney, filed a timely appeal from a June 24, 2014 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 properly terminated appellant's compensation benefits on October 17, 2013 pursuant to 5 U.S.C. § 8106(c).

On appeal appellant's attorney asserts that the June 24, 2014 decision is contrary to fact and law.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On December 9, 2009 appellant, then a 53-year-old city letter carrier, filed a traumatic injury claim alleging that he felt a sharp pain behind his left knee while walking. On July 1, 2010 he filed a recurrence claim, stating that his left knee got worse after the May 2010 injury with pain and swelling. Appellant had stopped work on May 18, 2010. On July 19, 2010 OWCP accepted that he sustained an employment-related left knee sprain/strain, and on August 31, 2010 additionally accepted tear of lateral meniscus of the left knee and unspecified localized osteoarthritis of the left lower leg.

By decision dated September 17, 2010, OWCP denied appellant's claim for wage-loss compensation for the period May 8 through June 21, 2010 because the medical evidence did not establish disability from work for the claimed period. It accepted that he sustained a recurrence beginning June 22, 2010, and he received compensation beginning that day. Appellant was placed on the periodic compensation rolls effective November 21, 2010.

In October 2010 OWCP authorized a left total knee arthroplasty which was performed by Dr. Adolph V. Lombardi, Jr., a Board-certified orthopedic surgeon, on March 31, 2011. Dr. Lombardi reported appellant's follow-up care, and appellant was referred for physical therapy.

In an August 22, 2011 report, Dr. Stephen Altic, an attending osteopath, advised that appellant was slowly improving from his left knee arthroplasty. He recommended eight more weeks of knee conditioning. On attending physician's reports dated August 23 and November 7, 2011, Dr. Altic diagnosed left knee degenerative joint disease and advised that appellant remained totally disabled.

Dr. Lombardi completed a work capacity evaluation on January 31, 2012 in which he diagnosed left knee osteoarthritis and advised that maximum medical improvement should be reached by March 31, 2012. He provided physical restrictions including that walking was limited to one to two hours daily; no twisting, squatting, or kneeling; bending and stooping to less than one hour; and pushing a wheeled cart limited to one hour daily.

In January 2012 OWCP referred appellant to Dr. David K. Halley, Board-certified in orthopedic surgery, for a second opinion evaluation as to the extent of disability. In a February 3, 2012 report, Dr. Halley indicated that appellant had a past history of left knee surgery in 1974, 1984, and 1996 and left total knee replacement on March 31, 2011. He noted appellant's complaint of left knee pain and 5/5 strength. Dr. Halley stated that the replacement was well balanced and had excellent alignment and good stability. He opined that the surgical result was much better than appellant's perception, noting that appellant felt that the knee might give out, although this had never occurred. Dr. Halley advised that appellant had no residuals of the accepted left knee sprain or aggravation of degenerative joint disease other than some mild discomfort. He recommended work hardening program, to be followed by a gradual return to work. On an attached work capacity evaluation, Dr. Halley indicated that appellant could not return to his usual job and had restrictions on walking, standing, bending, and stooping and should forever avoid squatting, and kneeling. In a March 10, 2012 supplemental report, he advised that the work hardening and gradual restrictions were based on appellant's interpretation

of weakness which should be taken seriously and considered to be objective, in light of his job requirement of having to carry up to 70 pounds in all types of weather. Dr. Halley noted that appellant would soon have his one-year postsurgery examination. He indicated that an alternative to work hardening would be to begin work with shorter hours and gradually advance and to begin with temporary restrictions that could be discontinued in six to eight weeks. In an attached work capacity evaluation, Dr. Halley provided temporary restrictions of six to eight weeks' duration. Walking and standing were limited to four hours with a 45- to 50-pound restriction on pushing, pulling, and lifting. Appellant was not to squat or kneel permanently.

On April 24, 2012 Dr. Altic reiterated his diagnosis of left knee degenerative joint disease and advised that appellant could not return to work.

On May 19, 2012 the employing establishment offered appellant a part-time modified position for four hours a day. The duties described were to case a route for two hours and carry a route for two hours. Standing was limited to two hours, and walking and driving to one hour. Appellant refused the offered position.

In a May 3, 2012 report, Dr. Lombardi noted that appellant described no pain. He stated that appellant was currently employed but not working as a letter carrier. Examination showed a well-healed incision, no knee effusion, or tenderness. Appellant ascended stairs normally but needed a rail to descend and stated that he could walk an unlimited amount of time and required a cane to ambulate. An x-ray revealed the arthroplasty in satisfactory position and alignment. Dr. Lombardi diagnosed left knee osteoarthritis, status post total knee arthroplasty.

In May 30, 2012 reports, Dr. Altic noted appellant's report that he had ongoing difficulty with left knee strength which had not given out but felt somewhat unstable and that he had periodic numbness over the left lateral leg. Examination showed no signs of crepitus, instability or chondromalacia and popping over the medial left knee. Dr. Altic advised that appellant was capable of sedentary work for up to four hours daily with no excessive bending, turning or twisting, no kneeling, stooping, squatting, crawling, pushing, or pulling.

In a duty status report dated May 22, 2012, Dr. Lombardi indicated that appellant could not return to his regular work and could sit four hours a day with no standing, walking, climbing, kneeling, bending, stooping, twisting, pushing, or pulling.

In June 2012 OWCP determined that the position offered appellant was not suitable because it did not comport with Dr. Halley's March 10, 2012 restrictions. It referred appellant for vocational rehabilitation. Appellant was also referred to Dr. Halley for a second evaluation. Dr. Halley was asked to determine appellant's current ability to perform postal duties as a letter carrier.

In a July 6, 2012 report, Dr. Halley noted appellant's report that he had no confidence on steps or uneven surfaces for fear that the knee would give way and claimed that at the end of the day his knee would throb and would get stiff when he sat for more than 15 minutes. Appellant estimated that he could walk about 15 minutes and then had to rest and carried a cane for fear of falling, losing balance, or having his knee give way, which had never happened. On left knee examination, Dr. Halley noted well-healed incisions and no evidence of subluxation of the

patella. There was tenderness to palpation with some symptom exaggeration. No effusion was noted and appellant had good medial stability with strength essentially 5/5. Appellant could not fully squat. Dr. Halley advised that appellant could not return to letter carrier duties because of his perceived feeling that his knee would give out. He recommended that appellant return to work slowly as noted in his previous report. The only permanent restrictions were kneeling and crawling. In an attached work capacity evaluation, Dr. Halley stated that appellant had temporary restrictions of six to eight weeks on sitting, walking and standing and permanent restriction on squatting and kneeling. In an August 13, 2012 supplemental report, he noted that it had been over 16 months since appellant had his total knee replacement. Dr. Halley stated that appellant had an excellent clinical result including the alignment of his total knee replacement implant, excellent range of motion, and 5/5 strength. He felt that appellant's subjective complaint that his knee might give out was no longer justified, particularly, because he had the very same complaint before his total knee replacement. Dr. Halley concluded that, in all medical probability, appellant definitely should be able to work as a postal employee eight hours per day with no restrictions other than no repeated kneeling and squatting, which was difficult for most total knee patients. He reiterated his restrictions in an attached work capacity evaluation, noting that occasional squatting and kneeling were permanent restrictions.

On September 15, 2012 the employing establishment offered appellant a modified full-time position with duties of casing mail for two hours and delivering mail for six hours. The restrictions listed were occasional squatting and occasional kneeling. Appellant did not accept the position.

On October 12, 2012 vocational rehabilitation efforts were closed because appellant did not appear at scheduled meetings and did not carry out agreed upon actions.

On October 9, 2012 OWCP asked Dr. Altic to review Dr. Halley's reports and indicate whether he agreed with his conclusions. By letter dated November 13, 2012, it advised appellant that the position offered was suitable. Appellant was notified that if he failed to report to work or failed to demonstrate that the failure was justified, pursuant to section 8106(c)(2) of FECA, his right to compensation for wage loss or a schedule award would be terminated. He was given 30 days to respond. In November 20, 2012 correspondence, Dr. Altic indicated that he did not receive the October 9, 2012 letter. He opined that appellant was most likely totally disabled from being a letter carrier on a permanent basis. Dr. Altic recommended a functional capacity evaluation.

OWCP determined that a conflict in medical opinion had been created between the opinions of Dr. Altic and Dr. Halley regarding the conditions caused by appellant's work and regarding his ability to work and referred him to Dr. Michael S. Lefkowitz, a Board-certified orthopedic surgeon, for an impartial evaluation. In a February 12, 2013 report, Dr. Lefkowitz noted appellant's history of four knee surgeries and his review of the statement of accepted facts and medical record. He indicated that appellant reported no problems with activities of daily living and the history was negative for any episodes of his knee giving way, swelling, locking, or causing significant pain. Examination demonstrated full extension and 135 degrees of flexion with no pain in the knee with rotation of the hip, no effusion, and well-healed surgical incisions. Motor and sensory examinations were intact. Dr. Lefkowitz indicated that, with a degree of medical certainty, after having conducted a thorough history, having reviewed voluminous

records including the statement of accepted facts, and having performed a comprehensive physical examination, he did not believe that appellant had any residuals from the December 8, 2009 work injury. He indicated that all accepted conditions were addressed by the left total knee arthroplasty. Dr. Lefkowitz agreed with the work restrictions provided by Dr. Halley and specifically stated that appellant was capable of standing and walking an eight-hour day but would do best if he had permanent restrictions of no repetitive squatting or kneeling and should not repetitively jump from heights such as off of a truck bed or any elevation, as this could be detrimental to his knee replacement over time. He indicated that the current physical requirements of the modified letter carrier position, namely two hours of casing or sorting mail and six hours of walking and delivering, would clearly be something appellant was capable of doing with a well-functioning total knee arthroplasty in an otherwise healthy 56-year-old male. On a work capacity evaluation, Dr. Lefkowitz indicated that appellant had reached maximum medical improvement and the only restriction was that he rarely to occasionally squat or kneel and that he should not jump from any height greater than one foot.

On April 2, 2013 OWCP provided Dr. Altic a copy of Dr. Lefkowitz's report and asked that he comment. In an April 11, 2013 attending physician's report, Dr. Altic advised that appellant was permanently disabled as a letter carrier and could not squat or kneel and was restricted from extending walking and standing. In April 15, 2013 correspondence, he advised that, although appellant was permanently disabled as a letter carrier, he could perform some work and recommended a functional capacity evaluation.

On April 26, 2013 the employing establishment reoffered appellant the modified full-time modified position with duties of casing mail for two hours and delivering mail for six hours and restrictions of occasional squatting and occasional kneeling. Appellant was to return to work on May 4, 2013. He did not accept the position. On June 20, 2013 OWCP obtained pay rate information for the offered job.

By letter dated July 26, 2013, OWCP advised appellant that the position offered was suitable. Appellant was notified that, if he failed to report to work or failed to demonstrate that the failure was justified, pursuant to section 8106(c)(2) of FECA, his right to compensation for wage loss or a schedule award would be terminated. He was given 30 days to respond.

Appellant disagreed that the offered position was suitable, stating that he had not seen any job offers in the past and it was his understanding that the offer must come from OWCP. He noted that Dr. Altic indicated that he could not perform letter carrier duties.

On July 31, 2013 OWCP ascertained that the offered position remained available. By letter dated July 31, 2013, it advised appellant that his reasons for refusing the offered position were not valid, and he was given an additional 15 days to accept. Appellant returned to work on August 10, 2013 and worked three days. He did not return.[2]

In a September 6, 2013 report, Dr. Lombardi noted that appellant reported that he returned to carrying mail for three days and then his left knee started to click, so he stopped work. He indicated that appellant stated that he could walk greater than 10 blocks and no

[2] Appellant received no wage-loss compensation after August 9, 2013.

assistive devices were needed. Physical examination demonstrated a well-healed left knee incision. Appellant could ascend and descend stairs but required a handrail. Tenderness and mild effusion were present in the left knee. Dr. Lombardi diagnosed osteoarthritis and pain of the left knee, status post total knee arthroplasty on the left. He indicated that the implant was well positioned and stable and advised that appellant was unable to perform the duties of a letter carrier because overuse of the implant could cause accelerated wear and tear damage. Dr. Lombardi recommended a more sedentary position.

In a letter dated October 1, 2013, OWCP advised appellant that his reasons for refusing the offered position were not valid, and he was given an additional 15 days to accept. On a disability slip dated October 2, 2013, Dr. Thomas R. Alexis, a Board-certified internist, advised that "due to illness -- under my care, unable to perform work duties starting [August 14, 2013] through present time. Continued care still required."

By decision dated October 17, 2013, OWCP terminated appellant's compensation benefits on the grounds that he abandoned an offer of suitable work. It found that the weight of medical evidence rested with the opinion of Dr. Lefkowitz who provided an impartial evaluation.

On October 21, 2013 appellant, through his attorney, requested a hearing. At the hearing, held on April 10, 2014, appellant testified that his route was seven to 10 miles in length and that the position he returned to was a regular letter carrier position and was outside his restrictions. He stated that he again attempted to return to work in November 2013 and worked approximately two weeks. Appellant indicated that both in October and November 2013, he stopped work due to pain and swelling. The hearing representative left the record open for 30 days for appellant to submit additional evidence. Shawn Carter, a union steward, submitted a May 7, 2014 statement in which he noted that appellant had bilateral knee replacements and had attempted to return to work afterwards on several occasions. Mr. Carter maintained that the employer disregarded appellant's restrictions. In May 12, 2014 correspondence, the employing establishment advised that the duties of the modified positon were within his restrictions.

By decision dated June 24, 2014, an OWCP hearing representative affirmed the October 14, 2013 decision. She noted that OWCP followed all relevant procedural requirements and found that the weight of the medical evidence rested with the opinion of Dr. Lefkowitz, the referee physician.

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."[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

[3] 5 U.S.C. § 8106(c).

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

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] 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.[8] OWCP procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.[9]

Section 8123(a) of FECA provides that, if there is 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 an examination.[10] 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 an 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.[11] When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[12]

ANALYSIS

The Board finds that OWCP met its burden of proof in terminating appellant's wage-loss compensation on the grounds that he abandoned suitable work. The accepted conditions in this case are left knee sprain/strain, tear of lateral meniscus of the left knee, and unspecified osteoarthritis of the lower left leg. On March 31, 2011 Dr. Lombardi performed a left total knee arthroplasty. OWCP determined that a conflict in medical evidence had been created between Dr. Altic, an attending osteopath, and Dr. Halley, an OWCP referral orthopedic surgeon,

[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).

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

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity, Refusal of Job Offer*, Chapter 2.814.5 (June 2013); *see Lorraine C. Hall*, 51 ECAB 477 (2000).

[10] 5 U.S.C. § 8123(a); *see Y.A.*, 59 ECAB 701 (2008).

[11] 20 C.F.R. § 10.321.

[12] *V.G.*, 59 ECAB 635 (2008).

regarding appellant's work abilities and properly referred him to Dr. Lefkowitz for an impartial evaluation.

In his comprehensive February 12, 2013 report, Dr. Lefkowitz described physical examination findings that included no effusion and intact motor and sensory examinations. He indicated that with a degree of medical certainty, after having conducted a thorough history, having reviewed voluminous records including the statement of accepted facts, and having performed a comprehensive physical examination, he did not believe that that appellant had any residuals from the December 8, 2009 work injury because all the accepted conditions were addressed by the left total knee arthroplasty. Dr. Lefkowitz specifically stated that appellant was capable of standing and walking an eight-hour day but would do best if he had permanent restrictions of no repetitive squatting or kneeling and should not repetitively jump from heights such as off of a truck bed or any elevation, as this could be detrimental to his knee replacement over time. After his review of the modified letter carrier position description, he opined that appellant was capable of performing the job duties, noting a well-functioning total knee arthroplasty in an otherwise healthy 56-year-old male.

The modified position offered to appellant and which he abandoned was within these restrictions. It required that he case mail for two hours and deliver mail for six hours with restrictions of occasional squatting and occasional kneeling.

As noted above, in situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[13] While Dr. Altic advised on April 15, 2013 that appellant could not perform the duties of the modified position because he was totally disabled from letter carrier duties, it was the physician's opinion of total disability that was the basis of the conflict in medical opinion. Reports from a physician who was on one side of a medical conflict that an impartial specialist resolved, are generally insufficient to overcome the weight accorded the opinion of the impartial physician or to create a new conflict.[14]

In his September 6, 2013 report, Dr. Lombardi indicated that the implant was well positioned and stable and advised that appellant was unable to perform the duties of a letter carrier because overuse of the implant could cause accelerated wear and tear damage. He recommended a more sedentary position. No matter how reasonable these restrictions seem, the Board has long held that prophylactic work restrictions do not establish a basis for wage-loss compensation. A fear of future injury is not compensable under FECA.[15] As Dr. Lombardi's restrictions were prophylactic in nature, his report is not sufficient to show that the offered position was not medically suitable.[16] Dr. Alexis merely indicated that appellant could not work

[13] *Id.*

[14] *Jaja K. Asaramo*, 55 ECAB 200 (2004).

[15] *Manual Gill*, 52 ECAB 282 (2001);

[16] *See Eileen Chilek*, Docket No. 05-1077 (issued November 14, 2005).

due to an "illness." He did not address whether the period of disability claimed was due to the accepted conditions.

Appellant also submitted a statement from Mr. Carter, a union official. Whether a position is suitable is primarily a medical question.[17] Moreover, Mr. Carter described an incorrect medical history, noting that appellant had bilateral knee arthroscopies when he only underwent one procedure, and while Mr. Carter stated that appellant was working outside his restrictions, he provided no specific examples.

The Board finds that, as Dr. Lefkowitz provided a comprehensive, well-rationalized opinion in which he provided physical examination findings that indicated that appellant could work eight hours a day with the above restrictions, his opinion is entitled to the special weight accorded an impartial examiner and constitutes the weight of the medical evidence.[18]

There is also no evidence of a procedural defect in this case as OWCP provided appellant with proper notice. Appellant was offered a suitable position by the employing establishment which he abandoned after working several days. Thus, under section 8106(c) of FECA, OWCP met its burden of proof to terminate appellant's wage-loss compensation on the grounds that he abandoned an offer of suitable work.[19]

The Board, however, notes that the record indicates that appellant's wage-loss compensation was stopped on August 9, 2013 and OWCP did not terminate his entitlement to monetary compensation in accordance with section 8106(c) until October 17, 2013. Appellant would therefore be entitled to wage-loss compensation for this brief period.

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 that OWCP met its burden of proof to terminate appellant's wage-loss compensation on October 17, 2013 pursuant to section 8106(c) of FECA. Appellant remains eligible for medical benefits. He is entitled to wage-loss benefits for the period August 9 to October 17, 2013.

[17] *Supra* note 8.

[18] S*upra* note 12.

[19] *Supra* note 4.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 24, 2014 is affirmed as modified.

Issued: January 7, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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