United States Department of Labor
Employees' Compensation Appeals Board

D.V., Appellant	)	
and	)	**Docket No. 15-1845**
	)	**Issued: February 2, 2016**
DEPARTMENT OF VETERANS AFFAIRS, BROCKTON VETERANS ADMINISTRATION MEDICAL CENTER, Brockton, MA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 9, 2015 appellant, through counsel, filed a timely appeal of the June 8, 2015 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 appellant has established that his refusal of suitable work was justified.

FACTUAL HISTORY

This case has been before this Board on prior appeal. The facts as set forth in the Board's previous decision are incorporated herein by reference.[2] The relevant facts are as follows. On

[1] 5 U.S.C. § 8101 *et seq.*

[2] Docket No. 14-1181 (issued October 20, 2014).

April 15, 2009 appellant, then a 54-year-old housekeeping aid, filed a traumatic injury claim (Form CA-1) alleging that on April 10, 2009 he sustained a right knee sprain while "bending down cleaning." OWCP accepted his claim for right knee strain, effusion right knee, and chondromalacia patella. It paid appellant wage-loss compensation and medical benefits and placed him on the periodic rolls effective December 19, 2010. A dispute arose between appellant's treating Board-certified orthopedic surgeon, Dr. Anthony Schena, and the second opinion Board-certified orthopedic surgeon, Dr. Stanley Hom, with regard to the nature of appellant's work capacity. In order to resolve the conflict, OWCP referred appellant for an impartial medical examination with Dr. Harvey Taylor, a Board-certified orthopedic surgeon.

Dr. Taylor diagnosed appellant with right knee patellofemoral degenerative joint disease, right knee status post trochlear resurfacing and patellar replacement, and significant right quadriceps weakness. He opined that appellant's current condition was 50 percent related to his preexisting patellofemoral arthritis and 50 percent related to his significant quadriceps weakness. Dr. Taylor placed restrictions on appellant, of standing and walking limited to 15 to 20 minutes a day, driving to work limited to 15 to 20 minutes, lifting limited to one to two pounds, and he prohibited appellant from bending/stooping, squatting, kneeling, and climbing.

By letter dated April 1, 2013, the employing establishment offered appellant a position as a housekeeping aide in patient effects which was within the limitations as set by Dr. Taylor. It indicated that it was prepared to offer appellant a transit subsidy for his commute. Although appellant initially accepted the offer, there was evidence that he was disruptive and did not cooperate with the employing establishment with regard to accepting the position. On July 3, 2013 OWCP issued a decision terminating appellant's compensation effective July 28, 2013 for refusal of suitable work, and a hearing representative affirmed this determination in a decision dated December 16, 2013. The Board affirmed this determination on October 20, 2014, finding that the employing establishment offered appellant a position that was medically and vocationally suitable and that OWCP complied with the procedural requirements of section 8106(c).[3]

By letter dated November 25, 2014, appellant, through counsel, requested reconsideration and again argued that the employing establishment refused to employ appellant. In support thereof, appellant submitted a certificate of medical examination signed by a nurse practitioner whose signature is illegible at the employing establishment on June 27, 2013, wherein she listed appellant's work restrictions and indicated that appellant may walk no more than 10 to 15 minutes, stand for more than 15 to 20 minutes, and that lifting was limited to one to two pounds. The nurse practitioner noted that appellant was prohibited from bending, stooping, squatting, kneeling, or climbing, and was only allowed to operate a motor vehicle to and from work for 15 to 20 minutes. She checked a box indicating a recommendation that the employing establishment "take action to separate or do not hire," and noted that appellant was "unable to meet current restrictions."

Appellant also submitted a December 8, 2014 medical report detailing an examination of that date by Dr. Schena. Dr. Schena noted that appellant did have some mild swelling in his knee and a 1+ effusion, but when compared to his last visit, his quadriceps were stronger and

[3] *Id.*

bulkier. He noted that appellant still did not have full strength when compared to his left side, but that his quad strength was much better. Dr. Schena suspected that the swelling and stiffness that appellant has been experiencing was secondary to the chondromalacia noted at the time of his last surgery. He stated that as long as appellant was not having any pain and as long as his knee continued to function as it was, he would not recommend any intervention.

In a March 5, 2015 letter, the employing establishment argued that the prior decisions should be affirmed, noting that the factual evidence failed to support that appellant was incapable of performing the duties outlined in the April 1, 2013 job offer. It contended that appellant's own actions on June 27, 2013 led to the delay in his return to work.[4] The employing establishment stated that on that date the nurse practitioner noted that appellant's pain was 8/10 as compared to 7 days prior when it was 1/10. Appellant informed the nurse practitioner that he could not do the job offer, and that one of the workers' compensation specialists, Ray Collins, came down to deal with appellant and his concerns. The nurse practitioner contended that during this encounter appellant became verbally abusive towards Mr. Collins.

By decision dated June 8, 2015, OWCP denied modification of its prior decision.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[5] Section 8106(c)(2) of FECA provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to compensation.[6] OWCP may not terminate compensation without establishing that the disability ceased or that it is no longer related to the employment.[7] The Board has stated that monetary compensation payable to an employee under section 8107 are payments made from the Employees' Compensation Fund and are, therefore, subject to provision of section 8106(c).[8]

Section 10.517(a) of FECA's implementing regulations provide that an employee who refused to work after suitable work has been offered to or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified.[9] Pursuant to section 10.516, the employee shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.[10]

[4] Although the employing establishment indicated June 27, 2014 as the date, it is clear from the context of the statement that June 27, 2014 is the correct date.

[5] *Barry Neutuch*, 54 ECAB 313 (2003); *Lawrence D. Price*, 47 ECAB 120 (1995); *see also M.B.*, Docket No. 12-728 (issued September 26, 2012).

[6] 5 U.S.C. § 8106(c)(2); *see also Linda D. Guerro*, 54 ECAB 556 (2003).

[7] *Ronald M. Jones*, 52 ECAB 190 (2000); *Arthur R. Reck*, 47 ECAB 339 (1995).

[8] *Sandra A. Sutphen*, 49 ECAB 174 (1997); *Stephen R. Lubin*, 43 ECAB 564 (1992).

[9] 20 C.F.R. § 10.517(a); *see Ronald M. Jones, supra* note 7.

[10] *Id. at* § 10.516; *see Kathy E. Murray*, 55 ECAB 288 (2004).

After termination or modification of benefits clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant.[11]

ANALYSIS

The Board finds that appellant has failed to submit evidence sufficient to modify the prior determination that OWCP properly terminated appellant's compensation for his refusal to accept a suitable offer of employment.

The Board has previously determined that the position of the modified housekeeping aide offered by the employing establishment was suitable for appellant, as it was within the work capacity limitations set by the impartial medical examiner, Dr. Taylor. On appeal appellant submitted a certificate of medical examination by an unknown nurse practitioner for the employing establishment, dated June 27, 2013, wherein she indicated that action should be taken to separate or not hire as appellant was "unable to meet the current restrictions." The nurse practitioner noted that appellant could only walk for 15 to 20 minutes, stand for 15 to 20 minutes, lift one to two pounds, and operate a motor vehicle to and from work for 15 to 20 minutes. She noted that appellant was unable to bend, stoop, squat, kneel or climb. These are the very restrictions set by Dr. Taylor and the restrictions that were utilized to develop the position of modified housekeeping aide for appellant. Even though certain boxes were checked by the nurse practitioner who made certain recommendations, her entire report does not constitute probative medical opinion evidence as a nurse practitioner is not considered a physician as defined under FECA.[12]

The employing establishment has consistently stated that the position of modified housekeeping aide was available to appellant, and that it was appellant's refusal to cooperate with the process of returning to work which resulted in his not being able to work at the employing establishment.

Appellant also submitted a new medical report by Dr. Schena dated December 8, 2014. However, Dr. Schena did not discuss any work restrictions, and noted that, although appellant had some mild swelling in his knee, his quadriceps was stronger and bulkier. He did not indicate that appellant could not perform the duties of the job assignment. Furthermore, the Board notes that Dr. Schena was on one side of a conflict in medical evidence that was resolved by Dr. Taylor and Dr. Schena did not provide any new findings or rationale to support a greater restriction on appellant's ability to work. Reports from a physician who was on one side of a medical conflict that an impartial medical examiner resolved are generally insufficient to

[11] *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

[12] *L.B.*, Docket No. 13-1253 (issued September 18, 2013) (physician assistants, physical therapists, physical therapy assistants, and nurse practitioners do not qualify as physicians under FECA and therefore their medical reports do not qualify as probative medical evidence supportive of a claim for federal workers' compensation, unless such medical reports are countersigned by a physician). *See* 5 U.S.C. § 8101(2) (defines the term physician as used in FECA); *see also Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board held that medical opinion, in general, can only be given by a qualified physician).

overcome the weight accorded to the report of the impartial medical examiner, or to create a new conflict.[13]

Accordingly, after reviewing the new evidence of record, the Board finds that the position offered by the employing establishment was medically and vocationally suitable. The evidence submitted is not sufficient to establish that the refusal to accept the suitable job offer was justified. It is appellant's burden of proof and he has not met his burden in this case.[14]

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 appellant has not established that his refusal of suitable work was justified.

[13] *I.J.*, 59 ECAB 408, 414 (2008)

[14] *See, e.g., Hazel N. Clark*, Docket No. 04-0905 (issued August 13, 2004) (the Board had previously found the offered position to be suitable. Appellant requested reconsideration. The Board affirmed OWCP's finding that appellant did not meet her burden of proof to establish that her refusal to accept the suitable job offer was justified.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 8, 2015 is affirmed.

Issued: February 2, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy 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