United States Department of Labor
Employees' Compensation Appeals Board

ANDERSON L. CLARK, Appellant	)	
and	)	**Docket No. 06-73**
	)	**Issued: April 17, 2006**
U.S. POSTAL SERVICE, POST OFFICE, St. Petersburg, FL, Employer	)	

Appearances:
Dean Albrecht, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 12, 2005 appellant, through his representative, filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated August 31, 2005, which terminated his wage-loss compensation benefits effective September 4, 2005 for refusing an offer of suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office properly terminated appellant's wage-loss compensation effective September 4, 2005 pursuant to 5 U.S.C. § 8106(c)(2) on the grounds that he refused an offer of suitable work.

FACTUAL HISTORY

This is the third appeal in this case. The Board issued a decision on April 1, 1998 in which it reversed decisions of the Office dated June 11 and September 11, 1997,[1] finding that the Office improperly terminated appellant's compensation.[2] In a decision dated July 15, 2003, the Board reversed a February 3, 2003 Office hearing representative's decision which affirmed the termination of appellant's compensation on the grounds that he no longer had any continuing disability due to his accepted September 7, 1989 employment injury.[3] The Board found that the record contained an unresolved conflict in the medical evidence. The facts and the circumstances of the case up to that point are set forth in the Board's prior decisions and are incorporated herein by reference.[4]

Subsequent to the Board's July 15, 2003 decision, the Office referred appellant to Dr. Howard L. Schuele, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. James West, a treating orthopedic surgeon, and Dr. Joseph Sena, a second opinion Board-certified orthopedic surgeon, regarding whether appellant continued to have residuals of his accepted employment injury.

In a report dated December 4, 2003, Dr. Schuele reviewed the medical evidence, the statement of accepted facts and the surveillance tapes for the period June 14, 1994 to February 7, 2002. He diagnosed lumbar disc syndrome, left ankle degenerative arthritis and healed tibia and fibula fracture with shortened left leg. A physical examination revealed full range of motion in the back and "[o]n full flexion there is reversal of the curve," which appellant indicated as painful. With respect to objective testing, Dr. Schuele reported an x-ray interpretation revealed mild lumbar scoliosis formation on the right, at L2, and on the left at L3-4. A May 8, 2001 magnetic resonance imaging scan showed spondylosis in the lower and mid lumbar spine. Dr. Schuele noted the objective findings did not support appellant's subjective complaints. Moreover, he stated that the surveillance tapes supported a very active lifestyle, noting that appellant's back problem does not seem to hinder this. Dr. Schuele stated,

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[1] On September 7, 1989 appellant, then a 43-year-old mail processor clerk, filed a traumatic injury claim alleging that he injured his back that date while breaking down mail. The Office accepted the claim for a low back strain. This was assigned File number 06-0469808. On February 23, 1990 appellant filed an occupational disease claim alleging that on September 7, 1989 he first realized his lower back, left lumbar and left hip conditions were employment related. This was assigned File number 06-485173, which was deleted on May 31, 1990 as the Office determined appellant's February 23, 1990 claim was actually a claim for a recurrence of disability. The Office of Personnel Management approved appellant's application for disability retirement on October 2, 1990. Appellant retired from the employing establishment effective October 1, 1990. On July 22, 1991 the Office accepted appellant's recurrence claim and expanded his claim to include the condition of herniated nucleus pulposus. On October 2, 1991 appellant filed an election form opting to receive benefits under the Federal Employees' Compensation Act effective September 11, 1990. By letter dated September 27, 1991, appellant was placed on the periodic rolls for temporary total disability.

[2] Docket No. 98-75 (issued April 1, 1998).

[3] Docket No. 03-1009 (issued July 15, 2003).

[4] On July 3, 1997 and October 17, 2003 appellant filed election forms opting to receive compensation benefits under the Act.

"[a]s with all back problems there will be flair (sic) ups at times that will cause a decrease in activity and an increase in medication." As to appellant's work capability, Dr. Schuele concluded that appellant was capable of working eight hours per day within specified restrictions. In a December 12, 2003 work capacity evaluation form, Dr. Schuele noted appellant's restrictions as walking or standing up to 4 hours per day; twisting, bending and stooping up to 2 hours per day; pushing up to 75 pounds up to 1 hour per day; pulling up to 25 pounds for up to 1 hour per day; and no kneeling, climbing or squatting. He also noted that appellant would require a break for 10 to 15 minutes every 2 hours.

On March 10, 2004 the employing establishment offered appellant a modified mail processor position, working eight hours a day. The duties consisted of casing mail, placing trays of 25 pounds or less onto letter sorting machines, other clerical duties within his restrictions and placement of damaged mail for processing and distribution. Physical restrictions of the position were walking and standing 4 hours a day, twisting, bending and stooping 2 hours a day, pushing and pulling no more than 25 pounds for 1 hour per day, no squatting or kneeling or climbing and a rest break every 2 to 3 hours for 10 to 15 minutes. The employing establishment noted the restrictions of the position complied with those set forth by Dr. Schuele.

In a supplemental report dated April 15, 2004, Dr. Schuele responded that the restrictions he listed for appellant were mainly secondary to residuals of a left leg fracture and left ankle degenerative arthritis. He noted that appellant would be unable to lift more than 50 pounds due to his back condition and thus could not perform the duties of a mail processor.

By letter dated June 14, 2005, the Office advised appellant that it found the offered position of modified mail processor to be suitable. The Office noted the provision of 5 U.S.C. § 8106(c)(2) of the Act and advised appellant that he had 30 days to accept the position or provide reason for refusing the position.

In response received on July 14, 2005, appellant submitted a June 28, 2005 chart report and a June 28, 2005 x-ray interpretation by Dr. West and a June 28, 2005 report by Milton Bailey, MSW. Dr. West noted appellant's disability status had not changed as appellant "has been disabled as far as work activity is concerned." He reported findings from a recent MRI scan which revealed disc herniations at L2-3 and L3-4 and L4-5 and a bulging diffuse central disc at L1-2. Mr. Bailey indicated that he was treating appellant for his military related post-traumatic stress disorder which had been recently "exacerbated by news accounts of the Iraq War, marital conflict, medical conditions and other issues."

By letter dated July 28, 2005, the Office advised appellant that it reviewed appellant's reason for refusing the offered position and found the refusal was not justified. The Office advised appellant that the modified position was suitable work and he would be given an additional 15 days to accept the job offer without penalty. Appellant did not proffer any additional reasons within the time allotted.

By decision dated August 31, 2005, the Office terminated appellant's compensation effective September 4, 2005 on the grounds that he refused an offer of suitable work.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[5] The Office has authority under section 8106(c)(2) of the Act to terminate compensation for any partially disabled employee who refuses or neglects to work after suitable work is offered.[6] To justify termination, the Office must show that the work offered was suitable, that the employee was informed of the consequences of his refusal to accept such employment and that he was allowed a reasonable period to accept or reject the position or submit evidence or reasons why the position is not suitable and cannot be accepted.[7] Office regulations provide that, in determining what constitutes suitable work for a particular disabled employee, the Office 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.[8]

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.[9] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of her refusal to accept such employment.[10]

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.[11] The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of, physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the level of analysis manifested and the medical rationale expressed in support of the physician's opinion.[12]

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[5] *Kathryn E. Demarsh*, 56 ECAB ___ (Docket No. 05-269, issued August 18, 2005); *lla M. Frazier*, 55 ECAB ___ (Docket No. 04-120, issued March 11, 2004); *see also Roberto Rodriguez*, 50 ECAB 124 (1998).

[6] 5 U.S.C. § 8106(c); *see Dawn L. Westmoreland*, 56 ECAB ___ (Docket No. 05-167, issued April 12, 2005).

[7] *See Bryan O. Crane*, 56 ECAB ___ (Docket No. 05-232, issued September 2, 2005); *Ronald M. Jones*, 52 ECAB 190, 191 (2000); *Maggie L. Moore*, 42 ECAB 484, 488 (1991), *reaff d on recon.*, 43 ECAB 818, 824 (1992). *See also* 20 C.F.R. § 10.516 (the Office shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter the Office's finding of suitability).

[8] *Marilou Carmichael*, 56 ECAB ___ (Docket No. 04-2068, issued April 15, 2005); *Rebecca L. Eckert*, 54 ECAB 183 (2002).

[9] 20 C.F.R. § 10.517(a).

[10] *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, *supra* note 7.

[11] *See Kathy E. Murray*, 55 ECAB ___ (Docket No. 03-1889, issued January 26, 2004); *see also Maurissa Mack*, 50 ECAB 498 (1999).

[12] *Maurissa Mack*, *supra* note 11.

ANALYSIS

The Office accepted that appellant sustained a low back strain and herniated nucleus pulposus. On the issue of suitability, the Board finds that the Office properly determined that the special weight of the medical evidence rested with the report of the impartial medical examiner, Dr. Schuele, a Board-certified orthopedic surgeon, selected to resolve a conflict in medical opinions between appellant's attending physician Dr. West and the second opinion medical specialist Dr. Sena. The report of Dr. Schuele provided a thorough review of the medical records, his findings on physical examination and is well rationalized.[13] Dr. Schuele related appellant's history and symptoms in his December 4, 2003 report and diagnosed lumbar disc syndrome, left ankle degenerative arthritis and healed tibia and fibula fracture with shortened left leg. He opined that appellant could not perform his regular duties of a mail processor, but could perform light-duty work within specified physical restrictions. In a work capacity evaluation dated December 12, 2003, Dr. Schuele provided specific restrictions to appellant's physical activity. The offered position involved casing mail, placing trays of 25 pounds or less onto letter sorting machines, other clerical duties within his restrictions and placement of damaged mail for processing and distribution and comported with the restrictions set forth by Dr. Schuele. The Board finds that the modified mail processor position conforms with appellant's work restrictions as outlined by Dr. Schuele. The Office correctly found that the job was physically suitable.[14]

In order to properly terminate appellant's compensation under section 8106, the Office must provide him notice of its finding that an offered position is suitable and give him an opportunity to accept or provide reasons for declining the position.[15] The Board finds that the Office complied with its procedural requirements. On July 14, 2005 appellant responded to the Office's notice and submitted a June 28, 2005 x-ray interpretation and chart notes by Dr. West and a June 28, 2005 report by Mr. Bailey. Dr. West opined that appellant continued to be disabled from working and Mr. Bailey noted appellant's post-traumatic stress disorder had been exacerbated by nonemployment factors. Thereafter, the Office properly notified appellant that it had reviewed the evidence submitted by appellant and determined Dr. Schuele's opinion constituted the weight of the evidence. The Office informed appellant that his reasons for rejecting the offer were unacceptable as the medical evidence submitted by appellant was not probative to support his contention that he was unable to perform the duties of the offered position.[16] The Office properly advised that appellant had 15 additional days to accept the offer and if he did not, a final decision under 5 U.S.C. § 8106(c)(2) would be made. Under section

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[13] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is properly 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. *James P. Roberts,* 31 ECAB 1010, 1021 (1980).

[14] *See Ronald M. Jones*, 52 ECAB 190 (2000).

[15] *See Melvin James*, 55 ECAB ___ (Docket No. 03-2140, issued March 25, 2004); *Maggie L. Moore*, *supra* note 7.

[16] *See Sandra R. Shepherd,* 53 ECAB 735 (2002).

8106 of the Act, the Board finds that the Office properly terminated appellant's compensation benefits.

CONCLUSION

The Board finds that the Office properly terminated appellant's wage-loss compensation benefits effective September 4, 2005 pursuant to 5 U.S.C. § 8106(c)(2) on the grounds that he refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 31, 2005 is affirmed.

Issued: April 17, 2006
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board