United States Department of Labor
Employees' Compensation Appeals Board

W.F., Appellant	)	
and	)	**Docket No. 07-102**
	)	**Issued: October 2, 2007**
U.S. POSTAL SERVICE, CENTRAL CITY CARRIER FACILITY, Atlanta GA, Employer	)	

Appearances:
Appellant, pro se
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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 17, 2006 appellant filed a timely appeal of a May 31, 2006 Office of Worker's Compensation Programs' decision in which a hearing representative affirmed the termination of wage-loss benefits. Pursuant to 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 the Office properly terminated appellant's monetary compensation benefits effective March 2, 2005 under section 8106(c) of the Federal Employees' Compensation Act on the grounds that he refused an offer of suitable work.

FACTUAL HISTORY

On August 24, 1994 appellant, then a 36-year-old special delivery messenger, filed a traumatic injury claim alleging that on that date his postal vehicle was "rear-ended" while he was sitting at a red light and that this resulted in injuries to his neck and shoulders. By letter dated

August 24, 1994, the Office accepted appellant's claim for cervical strain. Subsequently, it accepted his claim for aggravation of cervical disc disease.

In an attending physician's report (Form CA-20), dated August 22, 2003, Dr. William F. Rainey, appellant's treating family practitioner, stated that appellant could perform light duty for six hours a day. He restricted appellant to light-duty work six hours a day in reports dated through January 23, 2004. On September 26, 2003 he responded to questions from the Office by indicating that the residuals of appellant's work-related injury had not resolved and that the expected recovery date was unknown.

By letter dated February 9, 2004, the Office asked Dr. Rainey to address appellant's work tolerance limitations. It asked him if appellant could return to work for eight hours a day and, if not, to provide an opinion on his limitations. Finally, the Office asked Dr. Rainey if appellant's restrictions were permanent and when he could return to his regular employment. In attending physician's reports dated February 20 and March 19, 2004, Dr. Rainey restricted appellant to working six hours a day.

On April 12, 2004 the Office referred appellant to Dr. Joseph Hoffman, Jr., a Board-certified orthopedic surgeon, for a second opinion. In a medical report dated April 27, 2004, Dr. Hoffman listed his impression as multilevel disc disease, cervical spine, posttraumatic in origin. He found that he had residuals of the accepted conditions of cervical degenerative disc disease and cervical sprain. Dr. Hoffman opined that any job which required that he lift excessive amounts of weight in a repetitive fashion would aggravate his condition. He advised, however, that appellant could work light duty for eight hours a day.

By letter dated May 26, 2004, the Office asked a Dr. Rainey if appellant could return to work eight hours a day with restrictions. Dr. Rainey responded that appellant was limited to working light duty for six hours a day. In a medical report dated July 15, 2004, he stated that appellant had been his patient for over seven years, that his problems with recurrent neck pain first appeared in 1988, that appellant continued to have problems with his neck, that he had approximately 15 to 20 percent loss of function and that his present job activities could further aggravate his condition. The Office found a conflict in medical opinion between Dr. Rainey and Dr. Hoffman as to appellant's capacity for modified duty.

On July 29, 2004 the Office referred appellant to Dr. Alexander Doman, a Board-certified orthopedic surgeon, for an impartial medical examination. On August 10, 2004 Dr. Doman diagnosed congenital spinal stenosis with multi-level disc bulge at C3-6. He opined that appellant did not have residuals of the accepted conditions of aggravation of cervical degenerative disc disease or cervical sprain. Dr. Doman noted that appellant was known to have congenital narrowing of the cervical spine that was not related to the occupational injury. He stated: "It is my firm and definite opinion that [appellant's] symptoms, at present, represent the natural history of the underlying cervical spinal stenosis." Dr. Doman opined that appellant was able to work eight hours a day as found by Dr. Hoffman and did not agree with Dr. Rainey that appellant was limited to six hours a day.

On July 30, 2004 Dr. Rainey reiterated that appellant could work no more than six hours a day.

On August 2, 2004 appellant filed a claim for a schedule award.

On November 4, 2004 the employing establishment provided a modified job offer to appellant as a clerk/special delivery messenger. The position would involve appellant scanning and separating incoming express mail, reviewing second notices for certified mail and return parcels, assisting with counting and recording business reply mail, assisting with scanning and inputting incoming certified mail and answering the telephone. It involved sitting, walking and standing up to eight hours a day, reaching up to two hour a day, reaching above shoulder one hour a day, twisting/bending stooping up to four hours a day, pushing/pulling/lifting up to 10 pounds for eight hours a day, squatting up to six hours a day. Appellant would ask assistance for lifting any item over 10 pounds.

By letter dated December 14, 2004, the Office notified appellant that the modified position offered by the employing establishment was suitable to his physical limitations. The Office stated that appellant had 30 days to accept the position or provide a written explanation for not accepting the position. The Office noted that, if appellant failed to report for the offered position or failed to demonstrate that the failure was justified, his right to compensation would be terminated. On January 14, 2005 the Office notified appellant that it had not received any response and provided 15 additional days to accept the position. By letter dated January 11, 2005, received by the Office on January 19, 2005, appellant noted his objection to working "protracted work hours." On January 18, 2005 the employing establishment advised the Office that the position was still available.

By decision dated March 8, 2005, the Office terminated appellant's wage-loss compensation effective March 20, 2005 due to his refusal of suitable work.

On April 7, 2005 appellant requested an oral hearing. In a February 18, 2005 report, Dr. Rainey indicated that appellant had been his patient for over five years. He stated:

> "It has been my opinion, based on [appellant's] early MRI [magnetic resonance imaging scan] findings, that he has severe [degenerative disc disease] (MRI scan was done prior to my taking over his case) he has had exacerbation because of trauma to his neck. The limitation of six hours per day are based on the examination in the office and my understanding of his work expectations."

A hearing was held on February 23, 2006. After the hearing appellant submitted a cervical MRI scan report dated April 4, 2006 and electromyogram examination results dated April 13, 2006.

In a May 26, 2006 decision, the Office hearing representative affirmed the March 5, 2005 termination of wage-loss benefits. He noted that appellant has failed to supply sufficient medical documentation to support his refusal of the suitable eight-hour position.

LEGAL PRECEDENT

Section 8106(c)(2) of the Act states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or

secured for him is not entitled to compensation.[1] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.[2] The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to future compensation and, for this reason, will be narrowly construed.[3]

The implementing regulation provides that an employee, who refuses or neglects to work after suitable work has been offered or secured by 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.[4] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[5]

The Act provides that, if there is a disagreement between a physician making an examination for the United States and the physician of he employee, the Secretary must appoint a third physician to make an examination.[6] The implementing regulation states 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 Office medical adviser or consultant, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.[7] It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on proper factual and medical background must be given special weight.[8]

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

---

[1] 5 U.S.C. § 8106(c)(2).

[2] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

[3] *Stephen A. Pasquale*, 57 ECAB __ (Docket No. 05-614, issued February 8, 2006).

[4] 20 C.F.R. § 10.517(a) (1999); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(5) (July 1997).

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

[6] 5 U.S.C. §§ 8101-8193, 8123(a).

[7] 20 C.F.R. § 10.321.

[8] *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

medical evidence.[9] It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.[10]

ANALYSIS

The Office accepted that appellant sustained a cervical strain and aggravation of cervical disc disease as a result of a work-related automobile accident on August 24, 1994. Dr. Rainey released appellant to return to work at modified duty for six hours a day. The Office referred appellant to Dr. Hoffman for a second opinion. On April 27, 2004 Dr. Hoffman found that appellant could work eight hours a day subject to specified restrictions. In order to resolve the conflict between Dr. Rainey and Dr. Hoffman, the Office properly referred appellant to Dr. Doman for an impartial medical examination. Dr. Doman reviewed appellant's extensive medical records, conducted a physical examination and found that appellant did not have residuals from his work-related aggravation of cervical degenerative disc disease or cervical sprain. He noted that appellant had congenital narrowing of the cervical spine that was not related to the accepted injury. Dr. Doman opined that appellant could work modified duty eight hours a day. He indicated that he was known to have congenital narrowing of the cervical spine and that this narrowing was not related to the occupational injury, but was long-standing in nature and developmental in origin. Dr. Doman noted that the accepted aggravation of the degenerative disc disease and cervical sprain was a self-limited disorder. Dr. Doman noted his agreement with the work limitations recommended by Dr. Hoffman. The Board finds that the opinion of Dr. Doman was based on a proper factual and medical background and is well rationalized. His opinion as the impartial medical specialist is entitled to special weight.[11] Appellant was subsequently offered modified duty that conformed with the physical restrictions approved by Dr. Doman. He did not accept the suitable job offer. Accordingly, the Office properly terminated appellant's monetary compensation benefits based on the opinion of the impartial medical examiner, Dr. Doman that appellant could work eight hours a day light duty.

At the hearing, appellant submitted an additional report from Dr. Rainey who reiterated his recommendation of six hours work. This report is not sufficient to overcome the special weight accorded to Dr. Doman as the impartial medical specialist.[12]

CONCLUSION

The Board finds that the Office properly terminated appellant's monetary compensation benefits effective March 2, 2005.

[9] *See Marilyn D. Polk*, 4 ECAB 673 (1993).

[10] *Stephen A. Pasquale*, 57 ECAB ___ (Docket No. 05-614, issued February 8, 2006).

[11] *Sharyn D. Bannick*, 54 ECAB 537 (2003).

[12] As Dr. Rainey was on one side of the conflict that was resolved by Dr. Doman, his report merely reiterated his prior opinion as to appellant's capacity for work and is insufficient to give rise to a new medical conflict. *See Barbara J. Warren*, 51 ECAB 413 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 31, 2006 is affirmed.

Issued: October 2, 2007
Washington, DC

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

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

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