United States Department of Labor
Employees' Compensation Appeals Board

M.G., Appellant	)	
	)	**Docket No. 08-2368**
and	)	**Issued: July 7, 2009**
	)	
DEPARTMENT OF THE INTERIOR, NATIONAL CAPITOL PARK CENTRAL, Washington, DC, 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
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On August 29, 2008 appellant filed a timely appeal from a June 3, 2008 merit decision of the Office of Workers' Compensation Programs that terminated his compensation for refusal of suitable work. 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 compensation under section 8106[1] on the grounds that he refused an offer of suitable work.

FACTUAL HISTORY

On January 18, 2005 appellant, a 55-year-old maintenance worker at the Jefferson Memorial, filed a traumatic injury claim (Form CA-1) for a right knee injury. He

[1] 5 U.S.C. § 8106.

attributed his injury to a January 10, 2005 employment event, while carrying trash down steps, he missed a step, injuring his knee. Appellant stopped work on January 10, 2005. The Office accepted the following conditions: sprain of other specified sites, knee and leg; and tear of medial meniscus of knee. Appellant underwent arthroscopic surgery on April 20, 2006. He returned to four-hour limited duty on October 16, 2006.[2]

The Office referred appellant, with a statement of accepted facts, to Dr. Montague Blundon, a Board-certified orthopedic surgeon. On March 5, 2007 Dr. Blundon in a March 14, 2007 medical report, diagnosed torn meniscus right knee and chondromalacia of the right knee. He opined that appellant had reached maximum medical improvement. Dr. Blundon concluded that appellant was able to return to full-time work, but with the restriction of no lifting over 20 pounds. In a subsequent work capacity evaluation, he asserted that appellant could return to full eight-hour duty with restrictions. The restrictions included no lifting more than 20 pounds no squatting, kneeling or climbing and 15-minute breaks every two hours. Dr. Blundon amended his restrictions in a note dated May 29, 2007, where he opined that appellant is able to do light-duty work restriction of no lifting over 20 pounds and no squatting, climbing or crawling.

Dr. Uchenna R. Nwaneri, orthopedic surgeon, treated appellant for his right knee injury. In a note dated March 23, 2007, he stated that appellant should continue working four hours a day and avoid prolonged standing or ambulation. Dr. Nwaneri also indicated that he should not climb stairs or ladders. On May 25, 2007 he reported findings upon examination of appellant's right knee. Dr. Nwaneri observed soft tissue swelling and tenderness to palpation. He diagnosed appellant with right knee pain, prescribed Celebrex and advised appellant to stay off his right knee.

In developing appellant's claim for a schedule award, the Office found a conflict in the medical opinion evidence concerning permanent impairment of appellant's right knee. It referred appellant to Dr. Hamid R. Quraishi, Board-certified orthopedic surgeon for a referee medical examination. In addition to questions regarding permanent impairment of the right knee, the Office asked Dr. Quraishi questions regarding appellant's ability to return to work. By report dated August 22, 2007, Dr. Quraishi diagnosed him with contusion of the right knee with suspected internal derangement. He reported that examination revealed appellant was walking with a slight limp and could not squat more than 50 percent. Dr. Quraishi opined that appellant had sustained a permanent injury to the right knee and had reached maximum medical improvement. He did not recommend any further medical treatment. Dr. Quraishi opined that appellant had residuals of injury, in the form of continual pain, but these residuals did not require ongoing medical treatment. Regarding appellant's ability to return to work, he asserted that appellant could do light duty for eight hours a day with the same restrictions as he had prior to the knee injury. Dr. Quraishi noted that his diagnosis was made per Dr. Nwaneri's reports and that he could not proffer a different diagnosis without first seeing the pictures of the arthroscopic surgery.

[2] Appellant had been placed on limited duty due to a previous work-related back injury. The record indicates that his limited-duty position required eight hours of work a day, with restrictions on lifting, sitting, standing, walking, climbing, kneeling, bending, stooping, twisting and pulling/pushing.

In a medical note dated September 14, 2007, Dr. Nwaneri diagnosed appellant with post-traumatic arthritis of the right knee. He released appellant to light-duty work, four hours per day and advised that appellant avoid prolonged standing and ambulation.

Based upon the medical evidence of record, on December 4, 2007, the employing establishment offered appellant a modified job as a maintenance worker for eight hours per day performing mopping and sweeping duties eight hours a day intermittently. Appellant was not required to lift more than 20 pounds, reach above the shoulder or crawl.

By letter dated December 13, 2007, the Office advised appellant that it found the offered position to be suitable employment. It advised appellant to accept the position or provide a written explanation of reasons for not accepting the position within 30 days. Appellant was advised that his compensation would be terminated if he did not justify his failure to accept the position.

Appellant did not accept the offered position or provide additional reasons for not accepting within 30 days of December 13, 2007.

By letter dated March 5, 2008, Dr. Nwaneri reviewed the job offer and opined that appellant could not perform the position. He reported that appellant had been able to return to work for some period now, working on modified duty status of four hours a day and requested that the position be further modified because appellant was not able to stand for more than four hours. Additionally, Dr. Nwaneri opined that appellant would be unable to perform the mopping duties of the position because it would require him to bend his knee, twist his knee and, in some cases, squat. Other than the issues concerning the amount of time spent standing and the mopping, he opined that appellant could do the rest of the job as described in the offer.

By note dated March 13, 2008, appellant argued that he could not perform the offered modified position and that the medical evidence of record from his physician supported his contention.

By decision dated May 20, 2008, the Office terminated appellant's wage-loss benefits effective May 1, 2008 on the grounds that he rejected suitable employment. It found that appellant failed to provide probative evidence to support total disability for the position or show just cause for refusal of the position and that "in the absence of anything to the contrary" the weight of consideration falls with the second opinion examiner, Dr. Blundon. By decision dated June 3, 2008, the Office rescinded its May 20, 2008 decision due to discrepancies between the date of the decision and periods of entitlement. By decision dated June 3, 2008, it terminated appellant's wage-loss benefits effective May 20, 2008 on the grounds that he rejected suitable employment.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation, including cases in which the Office terminates compensation under section 8106(c) for refusal to accept suitable work.[3] Section 8106(c)(2) of the Federal

[3] *Y.A.*, 59 ECAB ___ (Docket No. 08-254, issued September 9, 2008).

Employees Compensation Act 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.[4] To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[5] Section 8106(c) will be narrowly construed as it serves as a penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[6]

Office regulations provide that, in determining what constitutes suitable work for a particular disabled employee, the Office should consider 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] It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.[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 the medical evidence.[9]

Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer, medical evidence of inability to do the work or travel to the job or the claimant found other work which fairly and reasonably represents his or her earning capacity (in which case compensation would be adjusted or terminated based on actual earnings). Furthermore, if medical reports document a condition which has arisen since the compensable injury and the condition disables the employee, the job will be considered unsuitable.[10]

Section 10.516 of the Code of Federal Regulations states that the Office will advise the employee that the work offered is suitable and provide 30 days for the employee to accept the job or present any reasons to counter the Office's finding of suitability.[11] Thus, before terminating compensation, it must review the employee's proffered reasons for refusing or

[4] 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

[5] *Ronald M. Jones*, 52 ECAB 190 (2000); *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

[6] *Joan F. Burke*, 54 ECAB 406 (2003); *see Robert Dickerson*, 46 ECAB 1002 (1995).

[7] 20 C.F.R. § 10.500(b).

[8] *Richard P. Cortes*, 56 ECAB 200 (2004).

[9] *Bryant F. Blackmon*, 56 ECAB 752 (2005); *id.*

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (July 1997).

[11] 20 C.F.R. § 10.516.

neglecting to work.[12] If the employee presents such reasons and the Office finds them unreasonable, it will offer the employee an additional 15 days to accept the job without penalty.[13]

Section 8123(a) of the Act provides in pertinent part: 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.[14] In situations where 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.[15]

ANALYSIS

The Board finds that the Office did not meet its burden of proof in this case as an unresolved conflict of medical opinion exists concerning whether the offered modified position constitutes suitable employment. The Office has the burden of showing that the work offered and refused by appellant was suitable.

By letter dated December 4, 2007, the employing establishment offered appellant a modified job as a maintenance worker for eight hours per day, which required mopping/sweeping intermittently for eight hours each day. Appellant was not required to lift more than 20 pounds, reach above the shoulder or crawl.

Dr. Nwaneri, appellant's attending physician, had since March 23, 2007 reported that he should continue working four hours a day and avoid prolonged standing or ambulation. He had also indicated that appellant should not climb stairs or ladders. Furthermore, after reviewing the details of the offered modified position, Dr. Nwaneri opined that appellant could only work modified duty for four hours a day and that he could not perform the duties of the offered position because he was not able to stand for more than four hours or perform the mopping duties of the position because it would require him to bend and twist his knee.

On the other side of this issue was Dr. Blundon, an Office referral physician, who opined that appellant could work full time within restrictions. But he did not review the offered modified position or proffer a rationalized medical opinion as to whether or not appellant could perform the position as defined by the employing establishment.

The Office's procedural manual clearly provides that if the attending physician finds that the claimant should not perform the duties of the offered position and a second opinion specialist states that claimant can in fact perform those duties, then a conflict in the medical evidence

[12] *See Sandra K. Cummings*, 54 ECAB 493 (2003); *see also Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992) and *see supra* note 10, which codifies the procedures set forth in *Moore*.

[13] *Id.*

[14] 5 U.S.C. § 8123(a).

[15] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

exists as to whether the position offered can be considered suitable.[16] In the case at hand however the Office did not resolve the conflict. Rather, it found that the opinion of the second opinion physician, Dr. Blundon, constituted the weight of the medical evidence, "absent evidence to the contrary."

The Board notes that the Office had referred appellant to Dr. Quraishi for an impartial medical examination, who also opined that appellant could perform light-duty work for eight hours per day. The purpose of the referral however was to resolve the conflict in medical opinion evidence regarding the degree of permanent impairment to appellant's right knee, not whether the position was suitable employment. The Office therefore did not rely on Dr. Quraishi's report as that of the impartial medical specialist to resolve the conflict regarding the suitable work offer.

Therefore, the Board finds a conflict in medical opinion necessitating referral to an impartial medical specialist under section 8123(a)[17] of the Act. Due to the unresolved conflict in medical opinion, the weight of the evidence does not establish the suitability of the offered position. The Board finds that the Office did not discharge its burden of proof to justify the termination of appellant's compensation under section 8106(c)(2). The Board will reverse the Office's June 3, 2008 decision.

CONCLUSION

The Board finds that the Office did not meet its burden to terminate appellant's compensation under 5 U.S.C. § 8106(c)(2). There is an unresolved conflict in medical opinion on whether the offered position is suitable.

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5.a(4)(b) (July 1997).

[17] *See supra* note 14.

ORDER

IT IS HEREBY ORDERED THAT the June 3, 2008 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 7, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board