United States Department of Labor
Employees' Compensation Appeals Board

S.K., Appellant	)	
and	)	**Docket No. 08-1334**
	)	**Issued: March 9, 2009**
U.S. POSTAL SERVICE, CAMP WOOD POST OFFICE, Camp Wood, TX, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 2, 2008 appellant filed a timely appeal from a December 14, 2007 decision of the Office of Workers' Compensation Programs terminating his compensation, and September 27, 2007 and March 5, 2008 nonmerit decisions denying a merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim and over the nonmerit denials of reconsideration.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation under 5 U.S.C. § 8106(c)(2) on the grounds he refused an offer of suitable work; and (2) whether the Office properly denied appellant's June 25, 2007 and March 5, 2008 requests for a merit review.

FACTUAL HISTORY

The Office accepted that on or before August 16, 2001 appellant, then a 45-year-old distribution clerk, sustained an aggravation of cervical degenerative disc disease. Appellant stopped work in early September 2001. The Office placed appellant's case on the periodic rolls effective February 25, 2002.

Beginning in August 2001, appellant was followed by Dr. Gilbert R. Meadows, an attending Board-certified neurosurgeon, who diagnosed cervical degenerative disc disease, herniated discs at C4-5, C5-6 and C6-7 and spinal stenosis at C5-6. On September 24, 2001 Dr. Meadows performed a three-level anterior cervical discectomy and fusion. In an April 24, 2002 report, he found appellant totally and permanently disabled for work due to sequelae of the cervical fusion as well as disc herniation at L3-4, L4-5 and L5-S1. A July 26, 2002 functional-capacity evaluation showed appellant could perform part-time light-duty work.

On January 21, 2003 Dr. Meadows performed an anterior C3-4 discectomy and fusion with allograft and anterior plate fixation, authorized by the Office. He submitted reports though April 2004 stating that the repeat fusion had not resolved and appellant remained permanently disabled for work. Appellant retired from the employing establishment effective April 16, 2004.

On February 27, 2004 the Office obtained a second opinion report from Dr. Govindasamy Durairaj, a Board-certified orthopedic surgeon, who reviewed the medical record and a statement of accepted facts. Dr. Durairaj opined that appellant was totally disabled due to cervical fusions and desiccated discs at L3-4, L4-5 and L5-S1.

The Office obtained a functional capacity evaluation on May 14, 2004, demonstrating that appellant could perform light or sedentary duty with restrictions. In a May 14, 2004 work capacity evaluation, Dr. Durairaj stated that appellant was permanently and totally disabled for all work. He found appellant unable to perform the sedentary tasks demonstrated in the functional capacity evaluation.

Dr. Meadows submitted reports from July 2004 to January 2006 finding appellant remained disabled. He recommended additional surgery. The Office then obtained a second opinion from Dr. Charles W. Kennedy, Jr., a Board-certified orthopedic surgeon. In an April 13, 2006 report, Dr. Kennedy opined that the proposed surgery and all past surgeries were inappropriate and that appellant had no work-related disability.

The Office obtained a second opinion regarding appellant's eligibility for a schedule award from Dr. David A. Roberts, a Board-certified orthopedic surgeon. In an April 13, 2006 report, Dr. Roberts opined that appellant had no impairment of the extremities originating in the spine. He stated that the proposed fusions were necessary. The Office then found a conflict of medical opinion between Dr. Meadows, for appellant and Dr. Kennedy, for the government

regarding appellant's ability to work. The Office selected Dr. Theodore W. Parsons, III, a Board-certified orthopedic surgeon, as impartial medical examiner.[1] In a June 1, 2006 report, Dr. Parsons noted that he did not have the x-ray films or other images from appellant's record but reviewed the imaging reports. He opined that any additional cervical fusions would fail. Dr. Parsons found that according to the 2002 functional-capacity evaluation, appellant was able to work four to six hours a day light duty, with lifting limited to 20 pounds. He noted that the Office must also consider appellant's deconditioned body habitus, chronic pain and use of prescribed narcotics.

On June 22, 2006 the employing establishment offered appellant a modified clerk position, performing clerical duties for six hours a day with Sundays and Tuesdays off. Appellant could stand, walk or sit. He was not required to lift more than 20 pounds, reach above the shoulder, twist, bend, stoop and squat or kneel. Appellant refused the offer on June 27, 2006, contending that Dr. Parsons improperly relied on the 2002 functional-capacity evaluation and not the more recent May 14, 2004 evaluation.

In a July 17, 2006 letter, the Office advised appellant that the offered position was suitable work within the restrictions provided by Dr. Parsons. It noted that if appellant did not accept the position or provide valid reasons for refusal within 30 days, his compensation would be terminated.

In a July 19, 2006 letter, Dr. Meadows reviewed the job offer and stated that appellant could perform the position for four hours a day, with lifting limited to 20 pounds occasionally and no lifting above table height. He commented that it "was more likely than not" that appellant's symptoms would prevent him from working four to six days each month. Dr. Meadows emphasized that the "problem is going to be sustained work hours five days per week as stated above." He noted that dividing the four-hour workday in two was inadvisable as appellant could not tolerate driving to and from work twice each day. Dr. Meadows explained that appellant was able to perform volunteer work or work on his ranch because he was able to "stop when he ha[d] to."[2]

Appellant responded by August 1, 2006 letter, reiterating that Dr. Parsons and Dr. Kennedy improperly relied on the 2002 functional-capacity evaluation. The Office advised appellant on August 7, 2006 that if he did not accepted the position within 15 days, his compensation would be terminated. In an August 18, 2006 letter, appellant contended that the C3-4 fusion was not resolved and he was unable to drive the 40 mile distance to and from work.

[1] In a May 23, 2006 letter, Dr. Meadows stated that Dr. Kennedy and Dr. Parsons were not competent to offer an opinion as they were not fellowship-trained spine surgeons. Also, Dr. Kennedy had not performed spine surgery for over two decades. Dr. Parsons stated in a June 30, 2006 letter that any Board-certified orthopedic surgeon could offer the requested opinion. He opined that a spine surgeon was not needed in this case.

[2] In an August 4, 2006 investigative memorandum and supporting exhibits, the employing establishment asserted that appellant could work four hours a day as he owned and operated a private sector business, volunteered as an emergency medical driver, participated in fundraising activities, went rifle hunting and worked on his ranch. Postal inspectors interviewed Dr. Meadows as part of the investigation.

On August 22, 2006 the employing establishment modified the job offer from six to four hours a day. The Office advised appellant that he had 15 additional days in which to accept the offered position or his compensation would be terminated. Appellant did not accept the job or report for duty.

By decision dated September 6, 2006, the Office terminated appellant's monetary compensation benefits effective that day under section 8106(c)(2) of the Federal Employees' Compensation Act, on the grounds he refused an offer of suitable work.

In a September 29, 2006 letter, appellant requested a review of the written record. He submitted additional medical reports. In a September 5, 2006 letter, Dr. Meadows stated that he was pressured by employing establishment inspectors to find appellant fit for duty. He contended that appellant was "unable to sustain a regular workweek" due to objective cervical spine disease. In a December 12, 2006 report, Dr. Meadows found appellant totally disabled for work and recommended testing for upper extremity neuropathies.

By decision dated and finalized December 22, 2006, an Office hearing representative affirmed the September 6, 2006 decision, finding that the Office properly terminated appellant's compensation as he refused an offer of suitable work.

In a June 25, 2007 letter, appellant requested reconsideration. He submitted additional medical reports. In a January 5, 2007 report, Dr. Meadows opined that appellant could probably work four hours a day with rest breaks but could not drive to and from work due to medication side effects. He recommended additional cervical fusions.[3] Dr. Meadows submitted February 20 and March 7, 2007 reports noting increasing symptoms in the C6-7 dermatome, correlating to March 7, 2007 magnetic resonance imaging (MRI) scan findings.

The Office obtained a second opinion report regarding the necessity of additional surgery from Dr. James F. Hood, a Board-certified orthopedic surgeon. In a May 8, 2007 report, Dr. Hood found appellant totally disabled for work due to an unstable cervical spine. He opined that the proposed fusions were medically necessary and appropriate. Based on Dr. Hood's opinion, the Office approved Dr. Meadows' request for surgery. On July 16, 2007 Dr. Meadows performed bilateral keyhole laminotomies at C7-T1, fusions with rod placement at C3, C4 and C7 bilaterally and posterior fusions at C3-4 and C7-T1 with autologous bone graft.

By decision dated September 27, 2007, the Office denied reconsideration on the grounds that appellant's request and the evidence submitted were not new or relevant and did not raise a substantive legal question.

In an October 19, 2007 letter, appellant requested reconsideration. He contended that the Office ignored the evidence that he was totally disabled for work at the time of the August 22, 2006 job offer. Appellant submitted additional evidence.

[3] A January 8, 2007 electromyogram (EMG) and nerve conduction velocity (NCV) study showed C5-6 radiculopathy and mild bilateral carpal tunnel syndrome.

In an October 4, 2007 report, Dr. Meadows found appellant permanently and totally disabled for work. In an October 9, 2007 letter, he stated that following the July 2007 cervical fusions, appellant had an 80 percent loss of cervical motion and could not posture his head looking up or down for more than a few seconds. Appellant could not lift more than 10 to 15 pounds. Dr. Meadows stated that when he previously found appellant able to work four hours a day, this was not "meant to mean four consecutive hours." He contended that employing establishment "inspectors coerced and cajoled statements … to read as they desired…."

By decision dated December 14, 2007, the Office denied modification. It found that Dr. Meadows and Dr. Parsons both opined that appellant could work four to six hours a day. Neither physician stated that appellant could not work four consecutive hours.

In a February 19, 2008 letter, appellant requested reconsideration. He submitted November 28, 2007 and January 29, 2008 reports from Dr. Meadows reiterating previous findings and his allegations regarding coercion by employing establishment inspectors.

By decision dated March 5, 2008, the Office denied reconsideration on the grounds that appellant's request and the evidence submitted were not new or relevant and did not raise substantive legal questions.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[4] In this case, the Office terminated appellant's compensation under section 8106(c)(2) of the Act, which 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."[5] 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.[6] For conditions not accepted by the Office as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation.[7] Once the Office establishes that the work offered was suitable, the burden of proof shifts to the employee who refuses to work to show that such refusal was reasonable or justified.[8] 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.[9]

[4] *Linda D. Guerrero*, 54 ECAB 556 (2003); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

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

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

[7] *Alice J. Tysinger*, 51 ECAB 638 (2000).

[8] *Bryant F. Blackmon*, 56 ECAB 752 (2005).

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

Section 10.517(a) of the Act's implementing regulations 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.[10] 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.[11] 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.[12]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained an aggravation of degenerative cervical disc disease on or before August 16, 2001. Appellant stopped work in August 2001 and did not return. He underwent multilevel cervical discectomies and fusions on September 24, 2001 and January 21, 2003. Dr. Meadows, an attending Board-certified orthopedic surgeon, found appellant totally and permanently disabled for work. Dr. Parsons, a Board-certified orthopedic surgeon and impartial medical examiner, opined on June 1, 2006 that appellant could perform light duty for four to six hours a day. Based on his opinion, the employing establishment offered appellant a light-duty modified clerk position on June 22, 2006, working four to six hours a day.

In a July 19, 2006 letter, Dr. Meadows reviewed the offered position. He opined that appellant could perform the described tasks for four hours a day. However, appellant would have a problem with "sustained work hours five days per week." Dividing the workday in two would create an additional problem with commuting round trip twice a day. Also, appellant would have four to six days absence a month due to his ongoing symptoms. Based on Dr. Meadows' opinion, the employing establishment modified the job offer to four hours a day. When appellant refused the position, the Office terminated his compensation under section 8106(c)(2) of the Act.

The Board finds that Dr. Meadows' July 19, 2006 letter demonstrated that appellant could not work four consecutive hours a day as required by the offered light-duty position. Dr. Meadows stated that appellant could not perform "sustained work" five days per week. Therefore, the position offered to appellant on June 22, 2006, as modified on August 22, 2006, was not suitable work. It was not within his physical capacities.[13]

The Board finds that Dr. Parsons' opinion is insufficient to outweigh that of Dr. Meadows. Dr. Parsons was selected an impartial medical examiner in this case to resolve the question of appellant's work capacity. However, his status as impartial medical examiner does not automatically accord his opinion extra weight. Dr. Parsons' opinion must be based on a complete medical history and reflect an accurate understanding of the medical record.[14] In

[10] 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 6.

[11] 20 C.F.R. § 10.516.

[12] *Kathy E. Murray*, 55 ECAB 288 (2004); *Anna M. Delaney*, 53 ECAB 384 (2002).

[13] *Mary E. Woodard*, 57 ECAB 211 (2005).

[14] *Nancy Keenan*, 56 ECAB 687 (2005).

opining that appellant could perform specific work tasks for four to six hours a day, Dr. Parsons relied on a July 26, 2002 functional-capacity evaluation, performed prior to appellant's January 21, 2003 cervical fusion. Dr. Parsons did not refer to the May 14, 2004 functional-capacity evaluation performed after the 2003 surgery. He did not explain why he did not use the most recent assessment of appellant's work capacity in formulating his opinion. Under these circumstances, Dr. Parsons' opinion cannot represent the weight of the medical evidence in this case.

Therefore, at the time the Office terminated appellant's compensation, there was, at best, conflicting medical evidence as to whether the offered position was suitable work. Its December 14, 2007 decision affirming this termination was therefore improper. On return of the case, the Office shall take appropriate action to reinstate appellant's monetary compensation benefits and pay appropriate retroactive compensation.

As the termination of appellant's monetary compensation is reversed, the second issue regarding the Office's denials of modification is moot.

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation benefits. The offered position was not suitable work. As the termination of appellants' compensation is reversed, the Office's denials of reconsideration are moot.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 14, 2007 is reversed. The Office's March 5, 2008 and September 27, 2007 decisions regarding the denials of appellants' requests for reconsideration are set aside.

Issued: March 9, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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