

On appeal, counsel asserts a conflict of medical opinion between Dr. Carl W. Heise, an attending physician, and Dr. David Rubinfeld, a second opinion physician, regarding whether appellant was medically able to perform an offered light-duty job.

FACTUAL HISTORY

OWCP accepted that on June 5, 2007 appellant, then a 61-year-old lead security screener, sustained a lumbosacral sprain/strain when he lifted a suitcase from a conveyor belt. Appellant stopped work that day and did not return. He received compensation for total disability on the supplemental rolls beginning July 21, 2007 and on the periodic rolls as of September 30, 2007.

Appellant submitted medical records regarding preexisting musculoskeletal conditions. He underwent a C4-5 anterior fusion due to a fracture in 1965. A March 6, 2006 magnetic resonance imaging (MRI) scan showed a large annular bulge at C6-7 with bilateral neural foraminal narrowing and ventral flattening of the spinal cord. Dr. Lee Berman, an attending Board-certified internist, treated appellant for arthritis of the left knee in August 2006.

In 2007 and 2008, appellant was followed by several attending physicians for L3-4 pathologies. Dr. John Dellorso, a Board-certified internist, submitted reports from June 6 to 27, 2007 diagnosing a severe lumbosacral sprain with L3-4 disc herniation and degeneration caused by the June 5, 2007 lifting incident. In a July 6, 2007 report, Dr. Patrick Roth, a Board-certified neurosurgeon, diagnosed an L3-4 annular tear and opined that appellant could not return to work. Dr. Daniel R. Van Engel, a Board-certified neurologist, administered epidural steroid injections from August to October 2007. In a November 21, 2007 report, he observed bradykinesia and increased muscle tone.³ Dr. Scott L. Gottlieb, a Board-certified anesthesiologist, administered lumbar nerve block injections in February 2008 to address an L3-4 disc bulge and lumbar facet arthropathy.

On March 4, 2008 OWCP referred appellant to Dr. Rubinfeld, a Board-certified orthopedic surgeon, for a second opinion examination. In a March 25, 2008 report, Dr. Rubinfeld reviewed the medical record and statement of accepted facts. He stated that appellant did not have any prior accidents or work injuries. In a March 19, 2008 examination, Dr. Rubinfeld noted bilaterally positive straight leg raising tests, restricted lumbar motion, decreased sensation in “the foot” and that appellant was unable to heel walk. He diagnosed a lumbosacral strain. Dr. Rubinfeld found no current disability from other nonwork-related preexisting or subsequent conditions. He opined that appellant could perform full-time restricted duty. Dr. Rubinfeld limited pushing, pulling and lifting to 40 pounds and no more than four hours a day, squatting and kneeling to three hours a day and climbing to two hours a day.

In an April 16, 2008 report, Dr. Van Engel opined that appellant did not have lumbar radiculopathy as an electromyography study of the lower extremities he performed that day was normal. He opined that appellant’s lower extremity dysesthesias, masked face, slow walk and cogwheel rigidity all supported a diagnosis of Parkinson’s disease. In a June 18, 2008 report,

³ A November 28, 2007 lumbar MRI scan showed degenerative changes from T12-S1, with an annular bulge at L3-4.

Dr. Van Engel opined that appellant's back pain was caused by degenerative lumbar facet disease.⁴

On October 7, 2008 the employing establishment offered appellant a limited-duty assignment as a lead transportation security officer at Newark-Liberty Airport. Duties to be performed while standing included monitoring exit points, inspecting passengers and directing passengers through detection equipment. The job required four hours of lifting, pulling and pushing, three hours of squatting and kneeling and two hours of bending and stooping. Lifting and carrying were limited to 30 pounds and pushing to 40 pounds. The position was from 12:00 p.m. to 8:30 p.m. Thursday through Monday, with a 30-minute lunch break and two 15-minute breaks.

On October 9, 2008 appellant underwent lumbar discography showing degenerative disc disease from L3-S1. The L3-4 disc was too severely degenerated to pressurize.

In an October 17, 2008 letter, OWCP advised appellant that the October 7, 2008 job offer was suitable work within Dr. Rubinfeld's March 25, 2008 restrictions. Appellant was afforded 30 days to accept the offer or provide good cause for refusal. OWCP noted that, under section 8106(c)(2) of FECA, a partially disabled employee who refused or neglected to work after suitable work was offered was not entitled to compensation. It specified that, if appellant refused the offered position or failed to report for duty when scheduled, his right to compensation and any future schedule award benefits would be terminated.

In a November 1, 2008 letter, appellant stated that he neither accepted nor rejected the job offer. He contended that he could not sit or stand for more than a few minutes. Appellant submitted August 13 and October 28, 2008 reports from Dr. James C. Farmer, an attending Board-certified orthopedic surgeon, noting absent Achilles' reflexes bilaterally and restricted lumbar motion. Dr. Farmer reviewed a May 8, 2008 MRI scan showing a left-sided L2-3 herniation with compression of the left L3 nerve root and significant disc degeneration at L4-5. He diagnosed discogenic back pain and recommended a lumbar fusion.

In a November 18, 2008 letter, OWCP advised appellant that he did not provide sufficient reasons for refusing the offered position and that Dr. Farmer's reports did not establish a work-related disability. It noted that it would not consider any further reasons to justify his refusal of the job offer. OWCP reminded appellant of the penalty provision under section 8106(c)(2) of FECA, that, if he refused the offer or failed to report for work within 15 days, his compensation benefits would be terminated.⁵

In December 2, 2008 statements, appellant noted that he retired from the employing establishment effective May 31, 2008. He asserted that the duties of the offered position exceeded his medical limitations.

⁴ On August 25, 2008 OWCP referred appellant for vocational rehabilitation services. The counselor conducted preliminary interviews with appellant on September 23, 2008.

⁵ In a November 25, 2008 memorandum, the vocational rehabilitation counselor noted that appellant "reported that he cannot accept the job as he is unable to move or stand without great pain. OWCP closed the vocational rehabilitation effort on December 3, 2008.

Dr. Heise, an attending Board-certified neurologist, submitted a December 2, 2008 report of a November 18, 2008 examination. In addition to degenerative lumbar disc disease and a positive discogram, he noted an old C4-5 wedge fracture with fusion and spinal cord atrophy and a protruding C5-6 disc with moderate-to-severe stenosis. Dr. Heise noted that appellant's Parkinson's disease had progressed in the right leg.⁶

By decision dated December 24, 2008, OWCP terminated appellant's monetary compensation benefits effective December 16, 2008 on the grounds that he refused an offer of suitable work under section 8106(c)(2) of FECA. It noted that the offered transportation security officer position was within Dr. Rubinfeld's restrictions and that retirement was insufficient grounds for refusing the job offer. Appellant remained entitled to medical benefits for treatment of the accepted lumbar sprain.

In a January 13, 2009 letter, appellant requested a telephonic hearing, held on May 14, 2009. At the hearing, he asserted that OWCP failed to consider his cervical fusion and Parkinson's disease when considering if the offered transportation security officer position was suitable work. Appellant noted that he could not turn quickly while standing, making it difficult to visually survey an area.

Following the hearing, appellant submitted a May 27, 2009 report from Dr. Heise noting continued severe lumbar pain and worsening Parkinson's disease. Dr. Heise noted that appellant had severe spinal stenosis at C6-7 and a complex situation at C4-5 due to the old fracture. On May 11, 2009 appellant consented to a lumbar decompression and fusion.

By decision dated and finalized August 5, 2009, OWCP's hearing representative affirmed the December 24, 2008 decision, finding no medical evidence to establish that appellant could not return to work in the offered limited-duty job.

In a September 23, 2009 letter, appellant requested reconsideration. He submitted a September 21, 2009 report from Dr. Heise finding that, as of November 18, 2008, he was unable to stand more than 10 to 15 minutes due to severe discogenic pain. Dr. Heise stated that appellant was "severely disabled."

By decision dated December 17, 2009, OWCP denied modification on the grounds that the new medical evidence submitted did not establish that appellant was medically incapable of performing the offered light-duty job.

In a December 23, 2009 letter, counsel requested reconsideration. He contended that Dr. Rubinfeld specialized in insurance examinations, had not performed spine surgery since his residency in 1978 and was biased against claimants.

⁶ Appellant also submitted a May 9, 2008 thoracic MRI scan showing degenerative changes without focal disc herniation and an October 10, 2008 lumbar computed tomography scan showing disc bulges throughout the lumbar spine.

By nonmerit decision dated March 4, 2010, OWCP denied reconsideration of the December 17, 2009 decision on the grounds that the evidence and arguments submitted were irrelevant to the medical issue in the claim.

In a May 19, 2010 letter, counsel requested reconsideration. He submitted an April 28, 2010 operative report of appellant's L3-4 fusion and L4-5 interbody cage placement.

By decision dated August 3, 2010, OWCP denied modification of the December 17, 2009 decision on the grounds that the evidence submitted was insufficient. It found that the April 28, 2010 operative report did not establish that the offered transportation security officer position was not suitable work.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁷ In this case, it terminated appellant's compensation under section 8106(c)(2) of FECA, 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."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 Section 10.517(a) of FECA's implementing regulations provide 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

To justify termination of compensation, OWCP must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.¹² It is well established that OWCP must consider preexisting and subsequently acquired conditions in evaluating the suitability of an offered position, whether occupationally related or not.¹³ OWCP's procedures provide that, if the medical record documents "a condition which has arisen since the compensable injury and this condition disables the claimant from the offered job, the

⁷ *Linda D. Guerrero*, 54 ECAB 556 (2003); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

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

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

¹⁰ 20 C.F.R. § 10.517(a); *Ronald M. Jones*, 52 ECAB 190 (2000).

¹¹ *Id.* at § 10.516.

¹² *Ronald M. Jones*, *supra* note 10.

¹³ *Richard P. Cortes*, 56 ECAB 200 (2004).

job will be considered unsuitable (even if the subsequently-acquired condition is not work related).”¹⁴

ANALYSIS

In determining that the October 7, 2008 job offer was suitable work, OWCP relied on the March 25, 2008 restrictions offered by Dr. Rubinfeld, a Board-certified orthopedic surgeon and second opinion physician, who based his restrictions on the diagnosis of lumbosacral sprain. Dr. Rubinfeld found appellant able to work eight hours a day with pulling, pushing and lifting limited to 40 pounds and no more than four hours a day, squatting and kneeling to three hours a day and climbing to two hours a day.

In contrast to Dr. Rubinfeld’s diagnosis of a lumbosacral sprain, appellant’s physicians diagnosed several vertebral and neurologic abnormalities. Dr. Heise, an attending Board-certified neurologist, diagnosed an old C4-5 fracture and C5-6 herniation on December 2, 2008. On September 21, 2009 he opined that appellant was severely disabled. Dr. Roth, an attending Board-certified neurosurgeon, diagnosed an L3-4 annular tear and opined that appellant could not return to work. Dr. Van Engel, an attending Board-certified neurologist, diagnosed degenerative lumbar facet disease. Dr. Farmer, an attending Board-certified orthopedic surgeon, diagnosed an L2-3 disc herniation, left L3 nerve root compression and degenerative disc disease at L4-5. Dr. Rubinfeld did not mention these diagnoses or findings, only a lumbosacral sprain. The Board finds a conflict in medical opinion arose as to appellant’s physical capacity for work prior to the termination of monetary benefits.

It is well established that, 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. OWCP did not appoint an impartial medical examiner in this case. The Board finds that OWCP’s termination of appellant’s monetary compensation was improper will be reversed

CONCLUSION

The Board finds that OWCP improperly terminated appellant’s monetary compensation benefits on the grounds that he refused an offer of suitable work.

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity, Offers of Employment*, Chapter 2.814(b)(4) (December 1993).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 3, 2010 is reversed.

Issued: August 23, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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