United States Department of Labor
Employees' Compensation Appeals Board

A.L., Appellant	)	
and	)	**Docket No. 12-1839**
	)	**Issued: August 28, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Bethpage, NY, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 29, 2012 appellant, through his attorney, filed a timely appeal from March 21 and July 5, 2012 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether OWCP properly terminated appellant's compensation benefits on the grounds that he refused an offer of suitable work; and (2) whether OWCP properly refused to reopen appellant's case for reconsideration of his claim under 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 30, 2008 appellant, a 50-year-old mail handler, injured his lower back while trying to pull plastic from a magazine on a conveyor belt. He filed a claim for benefits on December 8, 2008, which OWCP accepted for lumbar sprain and closed dislocation/subluxation of the lumbar vertebra. OWCP paid appellant compensation for total disability and placed him on the periodic rolls.

In a September 25, 2009 report, Dr. Steven Litman, Board-certified in pain management and appellant's treating physician, stated that appellant was experiencing pain across his lower back and down his right leg on a level of 8 on a scale of 1 to 10. He advised that appellant had a positive discography at L4-5 and L5-S1 with right radicular leg pain at the L5-S1 level. Appellant's most significant pain and pathology was at the L4-5 level but he also had significant narrowing and productive changes at the L5-S1 level. Dr. Litman diagnosed lumbosacral radiculopathy with severe low back pain and discogenic pain at the L4-5 level.

Dr. Litman related that appellant did not believe that he was capable of performing his job with the employing establishment, which required him to lift 70 pounds with frequent lifting and standing all day. He opined that appellant would not be able to return to that job, but could work light duty that did not require heavy lifting.

In an October 23, 2009 Form CA-17 duty status report, Dr. Litman stated that appellant was capable of working eight hours per day with the following restrictions: no lifting exceeding 70 pounds, intermittently; no bending/stooping for more than five hours, intermittently; and no twisting, pulling or pushing, fine manipulation or reaching above the shoulder for more than four hours per day.

In order to determine appellant's ability to work, OWCP referred him for a second opinion examination with Dr. P. Leo Varriale, Board-certified in orthopedic surgery. In a November 19, 2009 report, Dr. Varriale stated that appellant could work for four hours per day with the following restrictions: no sitting for more than two hours; no lifting exceeding 10 pounds for no more than one hour; no walking or standing for more than one hour; and no reaching above his head.

In a July 13, 2011 Form CA-17 duty status report, Dr. Litman stated that appellant was capable of working full time, for eight hours per day. He outlined the following restrictions: no lifting exceeding 50 pounds, intermittently; occasional climbing; no pulling or pushing for more than five to six hours per day, intermittently; kneeling up to three to four hours a day; bending/stooping, twisting for no more than six hours a day, intermittently; simple grasping for no more than five to six hours per day, intermittently.

On July 15, 2011 the employing establishment offered appellant a job as a modified mail handler for eight hours a day. The duties of the job involved reaching for mail and parcels and repositioning to process for six to eight hours; lifting/guiding mail weighing no more than 50 pounds, while standing for six to eight hours; pushing and pulling mail weighing no more than 50 pounds for six to eight hours; and restarting the conveyor machine for six to eight hours.

In a letter received by the employing establishment on July 20, 2011, appellant declined the employing establishment's job offer. He indicated that the offered position did not appear to be within his restrictions; in addition, he asserted that the job appeared to be substantially similar to his previous position, which he was not able to perform due to his accepted back injury.

By letter dated August 25, 2011, OWCP advised appellant that a suitable position was available and that, pursuant to section 8106(c)(2), he had 30 days to either accept the job or provide a written explanation for refusing the offer. It stated that if, he refused the job or failed to report to work within 30 days, it would terminate his compensation pursuant to 5 U.S.C. § 8106(c)(2).[2]

By decision dated September 28, 2011, OWCP terminated appellant's compensation benefits on the grounds that he refused an offer of suitable work.

In a report dated October 7, 2011, Dr. Margaret Moore, an osteopath, related that appellant had experienced back pain with radiation to his right leg and right foot since his 2008 work injury. She advised that he had undergone magnetic resonance imaging (MRI) scans, which indicated that he had disc herniations. Dr. Moore advised that appellant's symptoms were worsening; he had leg weakness and his prior disc herniations limited prolonged standing and sitting. She opined that he still qualified for disability from work and referred him for an MRI scan.

In a November 28, 2011 report, Dr. Moore reiterated her previous findings and conclusions and stated that appellant remained disabled from work.

By letter dated October 6, 2011, appellant, through his attorney, requested an oral hearing, which was held on January 4, 2012. At the hearing he testified that the job offer indicated that he would be assigned to work the APP semi-automatic machine, with which he was familiar because he had performed this job prior to his work injury. Appellant advised that this machine required constant standing, leaning, twisting and reshipping boxes to go; he asserted that he would be unable to engage in these tasks because he was unable to stand in one place or lean forward and pull objects, as the position required. He also stated that he would be unable to work with a 50-pound lifting limitation.

By decision dated March 21, 2012, an OWCP hearing representative affirmed the September 28, 2011 decision.

On June 15, 2012 appellant's attorney requested reconsideration.

In reports dated March 30, April 27 and June 1, 2012, Dr. Moore essentially reiterated her previous findings and conclusions and advised that appellant was still disabled from work due to his work-related lower back condition.

[2] 5 U.S.C. § 8106(c)(2).

By decision dated July 5, 2012, OWCP denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require OWCP to review its prior decision.

LEGAL PRECEDENT

Once OWCP accepts a claim it has the burden of justifying termination or modification of compensation benefits. Under section 8106(c)(2) of FECA[3] it may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[4] Section 10.517 of OWCP's regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured 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 a determination is made with respect to termination of entitlement to compensation.[5]

Before compensation can be terminated, however, OWCP has the burden of demonstrating that the employee can work; setting for 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.[6] However, all of appellant's medical conditions, whether work related or not, must be considered in assessing the suitability of the position.[7]

To justify termination, OWCP must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[8] This burden of proof is applicable if OWCP terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work.

ANALYSIS

On appeal, appellant's attorney contends that OWCP failed to establish that the employing establishment's job offer was suitable because the requirements of the position exceeded the physical restrictions imposed by the physicians of record.

The Board finds that OWCP failed to meet its burden to establish that appellant refused a suitable position in its September 28, 2011 decision. The determination of whether an employee

[3] *Supra* note 1.

[4] *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987).

[5] 20 C.F.R. § 10.517; *see also Catherine G. Hammond*, 41 ECAB 375 (1990).

[6] *Linda Hilton*, 52 ECAB 476, 481 (2001).

[7] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (December 1993).

[8] *See John E. Lemker*, 45 ECAB 258 (1993).

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]

The Board notes initially that, when appellant was examined by OWCP's second opinion physician, Dr. Varriale, he reported in November 2009 that appellant could only work four hours a day, with a number of restrictions including no lifting over 10 pounds.

More contemporaneously, Dr. Litman stated in his July 13, 2011 report that appellant was capable of working full time for eight hours per day, with restrictions of no lifting exceeding 50 pounds, intermittently; no pulling or pushing or simple grasping for more than five to six hours per day, intermittently; kneeling, three to four hours a day; bending/stooping, twisting for no more than six hours per day, intermittently.[10]

The employing establishment located a job as a modified mail handler which, it stated, was within the restrictions outlined by Dr. Litman. The July 15, 2011 job description, however, stated that the job involved reaching for mail and parcels and repositioning to process for six to eight hours; lifting/guiding mail weighing no more than 50 pounds, pushing and pulling mail weighing no more than 50 pounds for six to eight hours; and restarting the conveyor machine for six to eight hours. Since the job required appellant to engage in pushing and pulling for six to eight hours, as well as grasping mail for six to eight hours a day and did not explain how Dr. Litman's restrictions of no bending/stooping, twisting for more than six hours a day would be accommodated, the duties of the modified mail handler position exceeded the restrictions imposed by Dr. Litman in his July 13, 2011 form report. OWCP therefore erred by stating in its August 25, 2011 notice of termination that the modified mail handler job was suitable based on its comparison of the medical evidence with the physical requirements of the position. The medical evidence of record fails to establish that appellant can perform the duties of the modified carrier position.

As the weight of the medical evidence is insufficient to establish that appellant is capable of performing the offered position, OWCP did not meet its burden of proof to establish that he refused suitable work.[11] Accordingly, the Board reverses the March 21, 2012 decision.[12]

CONCLUSION

The Board finds that OWCP did not meet its burden to terminate appellant's compensation benefits pursuant to 5 U.S.C. § 8106.

[9] *Robert Dickinson*, 46 ECAB 1002 (1995).

[10] The Board notes that this report from Dr. Litman, appellant's treating physician, in which he revised his previous restrictions from 2009, was the only medical report issued within 18 months of the employing establishment's July 2011 job offer.

[11] *Barbara R. Bryant*, 47 ECAB 715 (1996).

[12] As the Board has reversed the March 21, 2012 merit decision, to consider OWCP's July 5, 2012 decision denying reconsideration would be premature.

ORDER

IT IS HEREBY ORDERED THAT the March 21, 2012 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 28, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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