United States Department of Labor
Employees' Compensation Appeals Board

L.W., Appellant	)	
and	)	**Docket No. 09-586**
	)	**Issued: December 14, 2009**
DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION & CUSTOMS ENFORCEMENT, Santa Ana, CA, Employer	)	

Appearances:
Daniel M. Goodkin, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 29, 2008 appellant filed a timely appeal from June 6 and December 11, 2008 merit decisions of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this case.

ISSUE

The issue is whether the Office met its burden of proof to terminate appellant's compensation benefits effective June 4, 2008 on the grounds that he had no continuing work-related disability.

On appeal appellant contends that the position offered was not specific as to the amount of standing and sitting required.

FACTUAL HISTORY

On March 7, 2007 appellant, then a 44-year-old special agent/criminal investigator, filed a Form CA-1, traumatic injury claim, alleging that he injured his right upper extremity while

performing handgun qualifications. He stopped work that day. On April 26, 2007 the Office accepted that appellant sustained a cervical strain and right shoulder strain. Appellant received appropriate continuation of pay and compensation.[1]

Appellant came under the care of Dr. Gary E. Brazina, a Board-certified orthopedic surgeon. In a March 14, 2007 report, Dr. Brazina noted the history of injury and a past medical history of employment-related injuries to the right shoulder and neck in 2002 and 2004. He provided findings on examination, diagnosed cervical sprain/strain, cervical radicular syndrome, rule-out herniated disc, cervical spondylosis and right shoulder sprain. Dr. Brazina advised that appellant was totally disabled.[2] A May 23, 2007 cervical magnetic resonance imaging (MRI) scan demonstrated a disc protrusion that compromised the C6 root at C5-6.[3] In an August 8, 2007 report, Dr. Brazina diagnosed herniated nucleus pulposus of the cervical spine, cervical degenerative joint disease, right shoulder sprain and cervical radicular syndrome.

On September 5, 2007 appellant filed a Form CA-2, occupational disease claim. He stated that during his 20 years as a special agent he had been exposed to countless situations that produced pain and traumatic impact on his right shoulder and neck, including physical and firearms training, difficult arrests, being hit by a car in November 2002, a motor vehicle accident in 2004 and the March 6, 2007 injury. In an October 3, 2007 form report, Dr. Brazina diagnosed herniated cervical disc and advised that appellant was totally disabled.

On October 4, 2007 appellant was referred to Dr. Bunsri T. Sophon, a Board-certified orthopedic surgeon, for a second opinion evaluation.[4] By report dated October 16, 2004, Dr. Sophon reviewed the statement of accepted facts and medical record and appellant's past medical history. He noted complaints of neck and right shoulder pain, radiating into the right arm with thumb numbness. Dr. Sophon provided findings on physical examination including decreased cervical spine and right shoulder range of motion and diminished right hand grip. Upper extremity motor strength was normal. Sensory examination revealed diminished sensation on the right thumb. Dr. Sophon diagnosed C5-6 disc extrusion with right C6 nerve root radiculopathy and right shoulder strain. He advised that the conditions were employment related and that appellant could return to light duty. In an attached work capacity evaluation, Dr. Sophon advised that appellant could work eight hours daily with restrictions of two hours reaching, pushing, pulling and lifting, no reaching above the shoulder and a 20-pound weight restriction. In a supplementary report dated October 29, 2007, he provided further explanation as to why appellant's cervical condition was employment related. In an attached work capacity

[1] Appellant has additional claims for injuries incurred on November 19, 2002 and June 24, 2004, accepted for soft tissue injuries.

[2] Appellant also submitted reports from Dr. David Velasquez, a chiropractor, and a June 24, 2004 report in which Dr. Brazina described an employment-related motor vehicle accident that occurred that day. He diagnosed cervical and thoracic sprain/strain and contusion of the left elbow.

[3] In June 2007 appellant was referred for a second opinion evaluation. Due to a misunderstanding, he was not examined. On September 4, 2007 the Office proposed a suspension of compensation for failure to attend the second opinion evaluation. The decision was not finalized.

[4] Dr. Sophon is also known as Dr. Bunsri Thanasophon.

evaluation, Dr. Sophon further restricted appellant, stating that he could sit, stand and walk for six hours in an eight-hour day.

On November 29, 2007 appellant's claim was accepted for cervical disc displacement and cervical radiculopathy on the right. He was placed on the periodic rolls.

In January 2008, appellant was referred for vocational rehabilitation. In a January 6, 2008 report, Dr. David Velasquez, a chiropractor, noted appellant's complaints of right shoulder and neck pain and that he constantly dropped objects. He diagnosed cervical radiculopathy at C6, cervical disc extrusion at C5-6, cervical myelopathy and double crush syndrome of the right upper extremity secondary to cervical radiculopathy and ulnar neuropathy. Dr. Velasquez listed restrictions to appellant's activity of 5 to 10 pounds lifting or carrying with his right arm, 20 pounds with the left; no right arm pushing and up to 20 pounds pushing on the left; no reaching or working overhead; pulling limited to 5 to 10 pounds on the right and 10 to 20 pounds on the left for up to 15 minutes, sitting, standing, keyboard use and driving limited to up to 60 minutes, after which appellant should lie down for 60 minutes, walking limited to 30 minutes, after which he should lie down and reading seated limited to 30 minutes, 60 minutes while lying down. A notation affixed to Dr. Velasquez's report stated, "I concur" with an initialed signature.[5]

On February 21, 2008 the employing establishment offered appellant a modified position as a duty agent. The position was described as desk duty, with no reaching above the shoulder or lifting, pushing or pulling over 20 pounds.[6] A conference was held on February 28, 2008 concerning the offered position with appellant, his attorney, two representatives from the employing establishment, and an Office claims examiner. The offered position was discussed. The employing establishment advised that appellant would retain the same pay and would work behind bulletproof glass. While the position was temporary, it could be extended. The position was further described as requiring loading a ream of paper into the printer and fax machine, pulling on doors to assure they were locked and keyboard work. Appellant did not accept the offered position because he wanted to have surgery before he returned to work. By letter dated March 3, 2008, counsel contended that Dr. Velasquez's January 6, 2008 report was cosigned by Dr. Brazina and that he rejected the offered position based on the recommendation of his physicians.

A second conference was held on March 6, 2008 with an injury compensation specialist from the employing establishment, appellant's vocational rehabilitation counselor and a senior Office claims examiner. The job offer was modified to reflect duty of 0830 to 1700 with a half hour for lunch. The position was at appellant's current grade and step. It was ascertained that the employing establishment would continue to pay appellant an average of 2 hours overtime daily or 25 percent of salary, and therefore he would be required to work 10 hours daily and that

[5] Although the identity of the signee is not readily apparent, when compared with signatures contained in the case record, it appears to be that of Dr. Brazina.

[6] The duties were specifically described as checking the general mailbox for messages on the receptionist and duty telephone; check fax and printer for traffic and distribute accordingly; notify next agent of significant ongoing operations; and notify of unscheduled changes in duty roster. In the evening appellant was to additionally perform a security check, including checking rooms, safes and turning off coffee pots.

there were no plans to terminate him. On April 2, 2008 the employing establishment offered appellant the modified-duty agent position with duty hours of 0830 to 1700 daily. On April 14, 2008 appellant declined the offered position, stating that it was outside the restrictions of Dr. Velasquez, as cosigned by Dr. Brazina, and that the offered position was vague regarding the number of hours required to perform each assigned duty.

On April 30, 2008 the Office notified appellant that, under the provisions of the Act, section 8101 *et seq.*, to deny compensation for wage loss for his claim it proposed the weight of the medical evidence, as characterized by Dr. Sophon's report, established that he could perform the light-duty position.

On May 14, 2008 appellant, through his attorney, disagreed with the proposed termination and submitted April 30, 2008 reports in which Dr. Ian Armstrong and Dr. Martin Krell, Board-certified neurosurgeons, reviewed the history of injury. Appellant reported that his right shoulder was injured in 2002 when an accused criminal ran into him with a car. Drs. Armstrong and Krell noted complaints or right-sided neck pain radiating into the arm, associated with numbness and tingling and provided findings on neurological examination. Traumatic right C5-6 disc extrusion due to the March 6, 2007 employment injury, right upper extremity radiculopathy and a 2002 right shoulder injury were diagnosed, and an anterior C5-6 discectomy and fusion were recommended. Drs. Armstrong and Krell concluded that appellant was temporarily totally disabled. In a May 15, 2008 report, Dr. Brazina advised that he concurred with the restrictions provided by Dr. Velazquez on January 6, 2008. He reiterated the diagnoses and advised that appellant's cervical degenerative disc disease and acute herniation at C5-6 were caused by his employment. A May 16, 2008 MRI scan of the cervical spine demonstrated a reduction in size of the disc extrusion at C5-6 and that the protrusion resulted in severe right foraminal stenosis and a moderate degree of foraminal stenosis on the left.

By decision dated June 6, 2008, the Office terminated wage-loss compensation, effective June 4, 2008.

On June 12, 2008 the Office referred appellant for a second opinion evaluation. In a June 4, 2008 report, received by the Office on June 13, 2008, Dr. Armstrong reviewed appellant's MRI scans, provided findings on examination and diagnosed traumatic C5-6 disc extrusion caused by the March 6, 2007 employment injury and objective right upper extremity radiculopathy. He advised that appellant was totally disabled. A June 19, 2008 upper extremity nerve conduction study (NCS) was normal. Electromyography (EMG) demonstrated right active C6 denervation or clinical radiculopathy by electrodiagnostic criteria. By reports dated July 9, 2008, Dr. Armstrong noted the positive EMG test findings and that appellant was now complaining of right lower extremity weakness and low back pain. He recommended an MRI scan of the lumbar spine and advised that appellant required urgent cervical spine surgery and was totally disabled.

On July 30, 2008 Dr. Sophon reviewed the medical record and appellant's complaint of constant sharp pain in his neck and right shoulder, radiating into the right arm and hand, made worse with prolonged sitting, standing, walking, bending and lifting. He provided findings on physical examination including decreased cervical spine and right shoulder range of motion and diminished grip strength on the right. Motor strength was within normal limits and sensation

was diminished on the lateral aspect of the right arm and hand. Dr. Sophon diagnosed C5-6 disc extrusion with right C6 nerve root radiculopathy and right shoulder strain. He reviewed the offered limited-duty position and advised that the description did not specify the physical requirements of the position in standing, walking or sitting. Dr. Sophon advised that appellant could perform the described duties if the physical requirements did not exceed the work restrictions he reported in an attached work capacity evaluation, in which he advised that appellant could work eight hours a day with permanent restrictions of six hours sitting, walking, standing; two hours reaching, pushing, pulling and lifting 20 pounds, and no reaching above the shoulder. On August 28, 2008 Dr. Armstrong performed anterior cervical discectomy at C5-6 with lateral decompression and foraminotomy. Appellant received wage-loss compensation effective August 29, 2008 and was returned to the periodic rolls.

On September 8, 2008 appellant, through his attorney, requested reconsideration of the June 6, 2008 decision, arguing that the offered modified-duty position was not sufficiently defined, as supported by Dr. Sophon's August 13, 2008 report, and that he was in agreement that cervical surgery was necessary based on objective findings of diminished sensation in the right upper extremity, weakness of handgrip, restriction of motion of the cervical spine and right shoulder, an abnormal MRI scan, and an abnormal EMG study. Counsel contended that the Office could not terminate appellant's compensation without first determining that the light-duty position was suitable, noting that the Office had, in fact, found the position not suitable because it was not a permanent position. He argued that the offered position did not provide the specific, physical requirements of the tasks listed and that, at a minimum, a conflict in medical evidence existed regarding appellant's work restrictions.

Dr. Armstrong submitted reports describing appellant's postoperative condition and advising that he could not work. On October 8, 2008 he noted that appellant had subjective lumbar radiculopathy of the right lower extremity and recommended lumbar MRI scan and lower extremity EMG and NCS. A November 20, 2008 MRI scan of the lumbar spine demonstrated Grade 1 anterolisthesis at L5-S1 with bilateral pars defects resulting in a moderate to severe degree of foraminal stenosis.

By decision dated December 11, 2008, the Office noted that temporary light-duty assignments do not require an analysis of suitability and denied modification of the June 6, 2008 decision.

LEGAL PRECEDENT

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[7] The Office's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[8]

[7] *Jaja K. Asaramo*, 55 ECAB 200 (2004).

[8] *Id.*

ANALYSIS

The Board finds that the Office did not meet its burden of proof to terminate his compensation benefits effective June 4, 2008. The Office did not follow proper procedures to determine that the modified job offered to appellant was suitable. Office procedures at Chapter 2.814 provide guidance for the development of claims pertaining to offers of modified employment by the employing establishment and the acceptance or rejection of such offers.[9] On review of a job offer prepared by the employing establishment, the Office may propose to terminate a recipient's wage-loss compensation under section 8106 of the Federal Employees' Compensation Act.[10] The April 30, 2008 notice given in this case, however, failed to do so. In order to properly terminate appellant's compensation under section 8106 of the Act, the Office must provide appellant notice of its finding that an offered position is suitable and give him 30 days to either accept or provide reasons for declining the position.[11] The April 30, 2008 notice merely stated that the evidence established that appellant was capable of performing light duty and that light duty was available. Appellant responded on May 14, 2008, objecting to the proposed termination and submitting additional medical evidence in which Drs. Armstrong, Krell and Brazina advised that he remained totally disabled. Under Office procedures, if the Office deemed this refusal unacceptable, appellant should have been provided an additional 15 days to accept the offered position.[12] Instead, on June 6, 2008 the Office terminated compensation without citation to any statutory authority for this action. Section 8106 is a penalty provision which will be narrowly construed on appeal.[13] Appellant's entitlement to wage-loss compensation has been significantly impaired without the proper procedural due process notice or protections issued under section 8106. The notice and termination decision in this case appear as aberrations to established Office procedures and the well-defined precedent of the Board.[14]

---

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

[10] 5 U.S.C. § 8106. Section 8106(c)(2) of the Act provides in pertinent part, "A partially disabled employee who ... refuses or neglects to work after suitable work is offered … is not entitled to compensation." 5 U.S.C. § 8106. To prevail under this provision, the Office must show that the work offered was suitable and must inform the employee of the consequences of refusal to accept such employment. An employee who refuses or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified. *Janice S. Hodges*, 52 ECAB 379 (2001). 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. *Gloria G. Godfrey*, 52 ECAB 486 (2001).

[11] Federal (FECA) Procedure Manual, *supra* note 9; *see Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[12] Federal (FECA) Procedural Manual, *supra* note 9 at Chapter 2.814.4(d)(1).

[13] *J.F.*, 60 ECAB ___ (Docket No. 08-439, issued October 24, 2008).

[14] Federal (FECA) Procedure Manual, *supra* note 9 at Chapter 2.414.4; *Maggie L. Moore*, *supra* note 11.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation effective June 4, 2008.

ORDER

IT IS HEREBY ORDERED THAT the decisions Office of Workers' Compensation Programs dated December 11 and June 6, 2008 be reversed.

Issued: December 14, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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