United States Department of Labor
Employees' Compensation Appeals Board

SERGIO SEPULVEDA, Appellant	)	
and	)	**Docket No. 04-2111**
	)	**Issued: November 24, 2004**
U.S. POSTAL SERVICE, POST OFFICE, El Paso, TX, Employer	)	

Appearances:
Sergio Sepulveda, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On August 25, 2004 appellant filed a timely appeal of the July 24, 2004 merit decision of the Office of Workers' Compensation Programs, which terminated compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of appellant's claim.[1]

ISSUE

The issue is whether the Office properly terminated appellant's compensation on the grounds that he refused an offer of suitable work.

[1] The record on appeal includes evidence received by the Office after the issuance of the July 24, 2004 decision. The Board is limited to reviewing the record as it existed at the time of the Office's final decision. 20 C.F.R. § 501.2(c). Accordingly, the Board may not consider the evidence submitted after the July 24, 2004 decision.

FACTUAL HISTORY

Appellant, a 33-year-old letter carrier, has an accepted claim for left knee sprain arising on October 15, 2003 when he stepped from his mail truck. He stopped working on October 22, 2003. The Office authorized arthroscopic surgery, which appellant underwent on December 18, 2003.[2] The Office paid appropriate wage-loss compensation and placed appellant on the periodic compensation rolls effective December 28, 2003.

On March 22, 2004 appellant's treating physician, Dr. Sides, completed a work capacity evaluation (Form OWCP-5c) noting that he could perform full-time, limited-duty work. Appellant was able to walk and stand for eight hours with regular breaks, but Dr. Sides limited him to one hour of squatting, kneeling, climbing, bending and stooping. He also restricted appellant's lifting to 55 pounds and recommended 15-minute breaks every 90 minutes.

The employing establishment advised that appellant returned to work on March 23, 2004, but only "worked approximately one hour standing casing his route." Appellant reportedly advised the employing establishment that he needed to return to his physician. An appointment was scheduled for later that afternoon and the employing establishment provided sedentary work until appellant left to attend his appointment.

Dr. Sides reported that he saw appellant on March 23, 2004. He noted that he had sent appellant back to work the previous day, but appellant reported that while he was getting ready for his route he experienced severe pain, discomfort and throbbing in his knee. Dr. Sides further noted that appellant did not believe he could work with the pain and discomfort and that appellant's supervisor reportedly sent him home. Physical examination revealed good range of motion of the knee and no effusion. Dr. Sides diagnosed chondromalacia of the patella, found appellant unable to work and recommended that he obtain a second opinion from Dr. David J. Mansfield, an orthopedic surgeon.

Dr. Mansfield examined appellant on March 29, 2004 and diagnosed chondromalacia of the patella. He stated that he advised appellant that his knee would be a chronic problem for him without an easy fix. Dr. Mansfield reported that arthroscopically, appellant's knee was within normal limits without any other problems. He indicated that appellant might benefit from a patellar knee sleeve or J brace, but he did not believe this would solve appellant's problem. Dr. Mansfield further stated that appellant needed to just continue with his therapy. He also indicated that appellant may need to look at getting a different kind of job because his current job was somewhat strenuous and for a person with his type of knee complaints this was probably not the best thing for him. He restricted appellant to two hours of intermittent walking per day.

Appellant requested a change of physician, which the Office denied. Dr. Sides became aware of appellant's request and, accordingly, he advised that he would no longer be treating appellant. In his April 5, 2004 clinic notes, Dr. Sides commented that Dr. Mansfield agreed that appellant could return to work. He made similar remarks in a report dated May 7, 2004.

[2] Dr. Eric E. Sides, a Board-certified orthopedic surgeon, performed a left knee arthroscopy with debridement of chondral changes. His postoperative diagnosis was Grade 3 chondromalacia of the patella and large Grade 3 chondral defect of the medial femoral condyle.

In a report dated May 13, 2004, Dr. Andrew J. Palafox, an orthopedic surgeon, advised that he began treating appellant for left knee pain on April 26, 2004. He reported that appellant had undergone arthroscopic surgery in December 2003 and since the surgery he continued with severe, burning pain and difficulties with activities of daily living, especially at night. Dr. Palafox noted radiating pain from the knee to the groin area. A May 3, 2004 magnetic resonance imaging (MRI) scan revealed Grade 1 chondromalacia patella, medial greater than lateral. Dr. Palafox diagnosed internal derangement, left knee with chondromalacia, which he related to appellant's employment. He further indicated that appellant was limited in his ability to stand or walk for prolonged periods of time. Dr. Palafox also stated that appellant had limited use of the left lower extremity secondary to chronic pain.

The Office referred appellant for a second opinion examination with Dr. Randy J. Pollet, a Board-certified orthopedic surgeon. In a report dated May 26, 2004, Dr. Pollet indicated that appellant's October 15, 2003 injury had resolved and he was able to return to his regular duties without restrictions. He noted that upon examination there were no significant objective clinical findings for continuing disability as a direct result of the left knee due to chondromalacia of the patella.

On June 16, 2004 the employing establishment advised appellant that because he had been medically cleared to return to his regular work he should report for duty on June 17, 2004 or provide acceptable documentation as to why he was unable to work. Appellant did not report to work on June 17, 2004.

On June 18, 2004 the Office advised appellant that the June 16, 2004 offer to return to his date-of-injury position was deemed to be medically suitable based on the opinions of Drs. Pollet, Mansfield and Sides. The Office allowed appellant 30 days to either accept the position or provide an explanation for refusing the position. Additionally, the Office advised appellant of the consequences under 5 U.S.C. § 8106(c)(2) of refusing an offer of suitable work.

The Office subsequently received June 24 and July 12, 2004 duty status reports (Form CA-17) from Dr. Palafox. The first report indicated that appellant was disabled pending a functional capacity evaluation. The July 12, 2004 report noted that appellant was able to resume work with a 15-pound lifting and carrying limitation. He was also limited to two hours of intermittent standing and two hours of intermittent walking. Additionally, Dr. Palafox limited appellant to four hours of driving. In a July 16, 2004 report, Dr. Palafox stated that he had seen appellant on July 12, 2004 for a follow up on his left knee injury and that a June 25, 2004 functional capacity evaluation (FCE) revealed that appellant was functioning at a light level of work competency. He further noted that he had completed a Form CA-17 reflecting appellant's restrictions. A copy of the June 25, 2004 FCE was also submitted to the Office.

By decision dated July 24, 2004, the Office terminated appellant's compensation for refusing to accept an offer of suitable work. The Office found Dr. Palafox's opinion unpersuasive and accorded determinative weight to Dr. Pollet's May 26, 2004 findings as he purportedly performed a "referee medical examination."

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[3] Under section 8106(c)(2) of the Federal Employees' Compensation Act the Office 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] To justify termination of compensation, the Office must show that the work offered was suitable,[5] and must inform appellant of the consequences of refusal to accept such employment.[6] An employee who refuses or neglects to work after suitable work has been offered or secured for her has the burden of showing that such refusal or failure to work was reasonable or justified.[7] Additionally, the employee shall be provided the opportunity to make such a showing before entitlement to compensation is terminated.[8]

ANALYSIS

The Office committed several errors in terminating appellant's compensation. First, the Office erroneously afforded determinative weight to Dr. Pollet's May 26, 2004 opinion purportedly because he performed a "referee medical examination." The Office did not refer appellant to Dr. Pollet to resolve a conflict in medical opinion because a conflict did not exist at the time of the April 20, 2004 referral. At one point, in its July 24, 2004 decision, the Office correctly noted that Dr. Pollet was a "second-opinion examiner." But within a few brief paragraphs the Office inexplicably designated Dr. Pollet as a referee medical examiner. As Dr. Pollet provided only a second opinion evaluation, his findings are not entitled to determinative weight normally reserved for an impartial medical examiner.[9]

The Office also failed to recognize that, while Drs. Mansfield and Sides shared the opinion that appellant could return to work, neither physician specifically indicated that appellant could resume his regular duties as a letter carrier. In fact, Dr. Mansfield specifically commented that appellant may need to look at getting a different kind of job because his current job was somewhat strenuous and for a person with his type of knee complaints this was probably not the

[3] *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

[4] 5 U.S.C. § 8106(c)(2); 20 C.F.R. § 10.517(a) (1999).

[5] *Arthur C. Reck*, 47 ECAB 339 (1996).

[6] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1972).

[7] 20 C.F.R. § 10.517(a) (1999).

[8] 20 C.F.R. §§ 10.516, 10.517(b) (1999); *John E. Lemker*, 45 ECAB 258, 263 (1993).

[9] The Act provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination. 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994). Where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

best thing for him. Moreover, Dr. Mansfield limited appellant to two hours of intermittent walking per day whereas appellant's normal duties required five hours of intermittent walking.

On May 7, 2004 when Dr. Sides last reported on appellant's condition, he did not state that appellant was able to resume his regular duties. Although he advised appellant that he could return to work on April 5, 2004, Dr. Sides responded "unknown" when asked to identify the date that appellant would be able to resume regular work. He discharged appellant from his care on April 5, 2004 because appellant requested another treating physician. Dr. Sides did not specifically indicate that appellant's condition had resolved or that he was capable of resuming his regular letter carrier duties.

The Board also notes that the Office mischaracterized Dr. Palafox's May 13, 2004 diagnosis as one of merely "pain." He relied in part on a May 3, 2004 MRI scan and he specifically diagnosed internal derangement, left knee with chondromalacia. He also stated that appellant was limited in his ability to stand or walk for prolonged periods of time.

The weight of the medical evidence does not clearly establish that appellant is able to resume his regular duties as a letter carrier. Dr. Pollet, who performed a second opinion examination on behalf of the Office, was the only physician of record to state that appellant's October 15, 2003 employment injury had resolved and he was able to return to his regular duties without restrictions. In contrast, Dr. Mansfield imposed a two-hour limitation on intermittent walking per day. Dr. Palafox limited appellant to two hours of intermittent standing and two hours of intermittent walking on July 12, 2004. Because appellant's regular duties require between two and three hours of intermittent standing and five hours of intermittent walking, the restrictions imposed by Drs. Mansfield and Palafox indicate that appellant would not be able to perform his regular duties as a letter carrier. Consequently, there is an unresolved conflict of medical opinion between Drs. Palafox and Mansfield on behalf of appellant and Dr. Pollet on behalf of the Office.[10] Given the conflicting state of the medical record, the Office has failed to meet its burden to justify modification or termination of benefits.[11]

The Board further finds that the Office's July 24, 2004 termination of compensation was procedurally flawed. Appellant submitted additional medical evidence in response to the Office's June 18, 2004 suitability determination. The Office acknowledged receiving the additional evidence submitted, but prior to terminating benefits on July 24, 2004 the Office did not advise appellant that this evidence was deemed insufficient to justify his refusal of the offered position. The Office should have provided appellant a 15-day notification and another opportunity to accept the position prior to terminating his compensation.[12]

In its July 24, 2004 decision, the Office's claims to have provided appellant with the appropriate 15-day notification on June 18, 2004. The June 18, 2004 correspondence referenced by the Office advised appellant that he was "expected to accept the [June 16, 2004 offered]

[10] 5 U.S.C. § 8123(a); *Shirley L. Steib*, *supra* note 9.

[11] *James B. Christenson*, *supra* note 3.

[12] *Linda Hilton*, 52 ECAB 476, 482 (2001).

position and report to duty … within 30 days." Appellant was further advised that, if he failed to accept the position, he must provide a written explanation of his reasons within 30 days. Thus, contrary to the Office's assertion appellant was not informed on June 18, 2004 that he had 15 days to accept the position or forfeit any further compensation. Appellant did not accept the position within the 30 days allotted, but he did submit additional medical evidence indicating that he was unable to perform the offered position. Under these circumstances, the Office should have advised appellant of its position regarding the newly submitted medical evidence and afforded appellant an additional 15 days within which to accept the offered position prior to terminating compensation.[13]

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation.

ORDER

IT IS HEREBY ORDERED THAT the July 24, 2004 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 24, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[13] *Id.*