United States Department of Labor
Employees' Compensation Appeals Board

O.W., Appellant	)	
and	)	**Docket No. 06-1607**
	)	**Issued: February 2, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Urbana, IL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 5, 2006 appellant filed a timely appeal from a June 22, 2006 merit decision of the Office of Workers' Compensation Programs denying modification of its termination of his compensation for refusing suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation for refusing suitable work under 5 U.S.C. § 8106(c).

FACTUAL HISTORY

On March 2, 1993 appellant, then a 32-year-old janitor, filed a traumatic injury claim alleging that he experienced back pain on February 24, 1993. He fell while carrying a heavy "bag of salt down the step." The Office accepted appellant's claim for low back strain, an aggravation of preexisting spinal stenosis at L3-4 and L4-5 and an aggravation of degenerative

disc disease at L5-S1. He worked light duty beginning February 26, 1993 and returned to full duty in July 1993. In June 1995, appellant underwent a laminectomy of the lumbar spine. He stopped work in 1997 and did not return.

By letter dated January 15, 2003, the Office requested that appellant submit a medical report addressing his current condition and work restrictions. In a work restriction evaluation dated June 26, 2003, Dr. Thomas L. Sutter, an attending osteopath Board-certified in family practice, found that appellant could not perform his usual employment due to deconditioning, obesity and degenerative joint disease. He opined that appellant could work beginning four hours and then increasing his hours. Dr. Sutter listed limitations of sitting, walking, standing and operating a motor vehicle four hours per day and lifting, pushing and pulling up to 10 pounds four hours per day. He determined that appellant could not reach, twist, bend or stoop.

Appellant underwent a functional capacity evaluation (FCE) in July and August 2003, which showed that he could perform sedentary- to light duty-employment. In a report dated August 13, 2003, Dr. Sutter reviewed the FCE and found that the results were not valid as appellant did not complete all the testing. He opined that appellant could work at a light to medium level beginning four hours per day and gradually progressing to eight hours per day.

On February 13, 2004 the employing establishment offered appellant a position as a modified labor custodian effective March 6, 2004. The position required appellant "to sweep floors, empty trash, dust furniture and run [a] scrubber on [the] workroom floor." Additional duties included "pushing and pulling a standard vacuum," washing windows and driving a tractor snowplow. The position required work hours of four hours per day initially "with a gradual increase to full duty." Appellant accepted the position on February 21, 2004. However, on February 26, 2004 he rejected the job offer because he was not able to stand the required time without experiencing back pain. Dr. Sutter reviewed the position of modified labor custodian and indicated that he could perform the duties.

By letter dated March 9, 2004, the Office advised appellant that the offered position was suitable and that section 8106(c) of the Federal Employees' Compensation Act[1] provided that an employee who refused an offer of suitable work was not entitled to further compensation. The Office afforded him 30 days to accept the offer or provide reasons for his refusal.

Appellant, in a letter dated March 19, 2004, responded that his physical condition prevented him from performing the duties of the offered position. He submitted a report dated July 23, 2001 from Dr. Robert J. Burkle, a Board-certified orthopedic surgeon, who diagnosed "a total lumbar laminectomy from L3 to the sacrum, scar tissue" and obesity. Dr. Burkle found that appellant was "totally disabled from doing any manual labor…."

In a letter dated April 21, 2004, the Office informed appellant that his reasons for refusing the position were unacceptable. The Office allotted him 15 days to accept the position or have his compensation terminated.

[1] 5 U.S.C. §§ 8101-8193.

Appellant did not accept the position. By decision dated June 8, 2004, the Office terminated appellant's compensation effective May 16, 2004 for refusing an offer of suitable work.

On July 20, 2004 appellant requested a review of the written record. However, on July 28, 2004 he informed the Office that he desired reconsideration instead of a review of the written record. Appellant submitted a report dated July 19, 2004 from Dr. James Kohlmann, a Board-certified orthopedic surgeon, who discussed appellant's history of a lumbar laminectomy and diagnosed a bulging disc at L4-5. Dr. Kohlmann opined in a narrative report and an accompanying work restriction evaluation that appellant was disabled from employment. In a letter dated September 24, 2004, he asserted that appellant was "most likely capable of sedentary part-time work."

By decision dated November 5, 2004, the Office denied modification of its June 2, 2004 decision. On November 20, 2004 appellant requested reconsideration. He submitted a report dated November 15, 2004 from Dr. Kohlmann, who related that based on the 2003 FCE and results of magnetic resonance imaging (MRI) scan studies, appellant was capable of sedentary employment.

In letters dated January 2 and February 9, 2005, the Office requested that Dr. Kohlmann and Dr. Sutter review the medical evidence and respond to questions posed about appellant's work limitations. In a response dated January 31, 2005, Dr. Kohlmann disagreed with Dr. Sutter's finding that the FCE was invalid and noted that appellant was in pain after the first day of testing. He found that appellant was not capable of performing light to medium work but could perform sedentary employment.

By letter dated March 9, 2005, the Office referred appellant to Dr. Lawrence K. Li, a Board-certified orthopedic surgeon, for a second opinion examination.

In a report dated March 25, 2005, Dr. Sutter indicated that the medical reports he reviewed did not alter his opinion of appellant's work capabilities but that he might change his findings after a "current history and physical examination on [appellant]."

In a report dated April 9, 2005, Dr. Li discussed appellant's complaints of cramping in his back and some leg pain and his history of a lumbar laminectomy at L3-4, L4-5 and L5-S1 and a discectomy at L5-S1. He stated:

> "I reviewed the job that was offered [appellant] of modified labor custodian. I do believe he is disabled from doing the duties of running a scrubber on a work floor, mopping floors and pushing a vacuum cleaner. Other than those duties, I think he is capable of all the other duties described."

In a work restriction evaluation dated April 7, 2005, Dr. Li found that appellant could walk and stand 4 hours per day and lift 10 pounds for 4 hours per day but could not twist, bend, squat, knee or climb.

By decision dated June 10, 2005, the Office denied modification of its termination of appellant's compensation for refusing suitable work. The Office determined that the opinion of

the second opinion physician was of little probative value. Appellant appealed to the Board but subsequently withdrew his appeal in order to request reconsideration. The Board dismissed the appeal on November 1, 2005.[2]

On November 16, 2005 appellant requested reconsideration.[3] In a letter dated June 15, 2005, the Office noted that the record contained a conflict in opinion between Dr. Sutter and Dr. Li regarding appellant's work restrictions. The Office referred appellant to Dr. Steven C. Delheimer, a Board-certified neurosurgeon, for resolution of the conflict.

In a report dated May 9, 2006, Dr. Delheimer reviewed the medical evidence of record and listed findings on physical examination. He found that appellant's subjective complaints were unsupported by the objective findings and that he was "capable of some form of gainful employment that would fall within the parameters outlined by his 2003 [FCE] and the job offer dated March 6, 2004." Dr. Delheimer reviewed the job offer of March 6, 2004 and stated:

> "I do not consider [appellant's] back injury to be the primary factor in his disability determination, but rather his morbid obesity and deconditioned status. Therefore, the capability of job performance falls into two categories --
>
> > (1) In my opinion, the major factor in determining [appellant's] disability status would be based on his deconditioned status (including cardiovascular deconditioning) secondary to his morbid obesity (in excess of 300 pounds), which first and foremost places him at a high risk for reinjury. These two conditions are the primary factors limiting his ability to safely perform or carry out the work activities outlined in the job offer dated March 6, 2004…. He has also utilized a cane for several years and although he was able to walk briefly without the cane during my exam[ination] and perform heel and toe walk without difficulty, I believe this assistive device would interfere with the job offer parameters as described above. Last and most importantly, during the 2003 functional capacity performance, [appellant] demonstrated significant cardiovascular deconditioning and required sitting breaks after each tested item on day one for his heart rate to recover; this factor alone would greatly interfere in his ability to safely carry out the job parameters offered in March 2004.
> >
> > (2) From a neurosurgical point of view with regard to the alleged back injury dating back to 1993, [appellant's] current spinal examination by MRI [scan] criteria and today's examination, I find no clinical reason to restrict [his] activities solely on his subjective complaints of back pain and left leg tingling…. In the absence of objective findings to corroborate [appellant's] subjective complaints, I would not consider him totally disabled from this perspective. In my opinion, he is capable of some type

[2] Order dismissing appeal, Docket No. 05-1414 (issued November 1, 2005).

[3] Appellant submitted medical reports with his request for reconsideration; however, the physicians do not address the issue of his work restrictions.

> of gainful employment that would fall within the parameters outlined in the [FCE] performed by Dr. Sutter in 2003 and the job offer/assignment dated March 6, 200, which was tailored to meet the claimant's physical needs. Even in this regard, it remains questionable whether full-time status could be obtained due to his complex medical conditions."

Dr. Delheimer found that appellant's pain was "out of proportion" to the objective findings. He reiterated that appellant was not totally disabled and that his "deconditioned status and morbid obesity are the two most significant factors in his ongoing subjective complaints of pain and his ability to safely carry out tasks that are greater than those of a sedentary physical demand level."

By decision dated June 22, 2006, the Office denied modification of the prior merit decision.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation, including cases in which the Office terminates compensation under section 8106(c) for refusal of suitable work.[4]

Under section 8106(c)(2) of the Act,[5] the Office may terminate compensation of an employee who refuses or neglects to work after suitable work is offered to or procured by or secured for the employee.[6] However, to justify such termination, the Office must show that the work offered was suitable and must inform the employee of the consequences of a refusal to accept employment deemed suitable.[7]

Section 10.516 of the Code of Federal Regulations states that the Office will advise the employee that the work offered is suitable and provide 30 days for the employee to accept the job or present any reasons to counter the Office's finding of suitability.[8] Thus, before terminating compensation, the Office must review the employee's proffered reasons for refusing

[4] 5 U.S.C. § 8106(c); *Henry W. Sheperd, III*, 48 ECAB 382, 385 (1997); *Shirley B. Livingston*, 42 ECAB 855, 861 (1991).

[5] 5 U.S.C. § 8106(c)(2).

[6] *Les Rich*, 54 ECAB 290 (2003).

[7] *Karen L. Yaeger*, 54 ECAB 317 (2003); *Sandra K. Cummings*, 54 ECAB 493 (2003).

[8] 20 C.F.R. § 10.516.

or neglecting to work.[9] If the employee presents such reasons and the Office finds them unreasonable, the Office will offer the employee an additional 15 days to accept the job without penalty.[10]

Section 8123(a) of the Act provides in pertinent part: "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."[11] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is properly referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[12]

ANALYSIS

The Office accepted that appellant sustained low back strain, an aggravation of preexisting spinal stenosis at L3-4 and L4-5 and an aggravation of degenerative disc disease at L5-S1 due to a February 24, 1993 employment injury. He underwent a lumbar laminectomy in June 1995. Appellant stopped work in 1997 and did not return.

The Office terminated appellant's compensation for refusing suitable work based on the opinion of his attending physician, Dr. Sutter, that he could perform the duties of the offered position of modified labor custodian. The Office subsequently developed the medical evidence and determined that a conflict existed between Dr. Sutter, who found that appellant could perform the position and Dr. Li, the Office referral physician, who found some of the duties of the position outside his physical capabilities. The Office properly referred appellant to Dr. Delheimer to resolve the conflict in opinion.[13] Based on the opinion of Dr. Delheimer, the Office denied modification of its finding that the position of modified labor custodian was suitable.

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[14]

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[9] *See Sandra K. Cummings*, *supra* note 7; *see also Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992) and 20 C.F.R. § 10.516 which codifies the procedures set forth in *Moore*.

[10] *Id*.

[11] 5 U.S.C. § 8123(a).

[12] *Glen E. Shriner*, 53 ECAB 165 (2001).

[13] *See* 5 U.S.C. § 8123(a).

[14] *David W. Pickett*, 54 ECAB 272 (2002); *Barry Neutuch*, 54 ECAB 313 (2003).

The Board finds that the Office did not meet its burden of proof to show that the modified labor custodian position was medically suitable. In a report dated May 9, 2006, Dr. Delheimer opined that appellant's subjective complaints were not supported by objective findings and that he could perform "some form of gainful employment…." He determined that appellant's obesity and deconditioning, including cardiovascular deconditioning, were "the primary factors limiting his ability to safely perform or carry out the work activities outlined in the job offer dated March 6, 2004." Dr. Delheimer further indicated that appellant's reliance on a cane for ambulation would interfere with his job duties. He asserted that appellant's "significant cardiovascular deconditioning" would alone "greatly interfere in his ability to safely carry out the job parameters offered in March 2004." Dr. Delheimer's opinion does not support a finding that appellant could perform the duties of modified labor custodian in view of his obesity and deconditioning. It is well established that the Office must consider preexisting and subsequently acquired conditions in evaluating the suitability of an offered position.[15] Regarding appellant's back condition, Dr. Delheimer found subjective complaints unsupported by objective findings. He asserted that appellant could work "in some type of gainful employment" consistent with the 2003 FCE and March 6, 2004 job offer. Dr. Delheimer stated: "Even in this regard, it remains questionable whether full-time status could be obtained due to his complex medical conditions." The Board notes that the job offer of modified labor custodian included the requirement that appellant initially work part time and then increase to full-time employment. Dr. Delheimer did not specifically find that appellant had the capacity to perform the duties of the modified labor position. Instead, he found that appellant could perform some duty, possibly part time, citing as limiting factors his obesity, deconditioning, use of a cane and general "complex medical conditions." As Dr. Delheimer's opinion on appellant's ability to perform the duties of the offered position of modified labor custodian is equivocal in nature, it is insufficient to support that appellant could perform the work of a modified labor custodian.[16]

On appeal, appellant contends that Dr. Sutter was not an attending physician but rather an Office referral physician. The record establishes, however, that his prior attending physician, Dr. James J. Harms, a Board-certified orthopedic surgeon, referred appellant to Dr. Sutter for rehabilitation assistance.

CONCLUSION

The Board finds that the Office did not properly terminated appellant's compensation for refusing suitable work under 5 U.S.C. § 8106(c).

[15] *Richard P. Cortes*, 56 ECAB ___ (Docket No. 04-1561, issued December 21, 2004).

[16] *See Ricky S. Storms*, 52 ECAB 349 (2001).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 22, 2006 is reversed.

Issued: February 2, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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