United States Department of Labor
Employees' Compensation Appeals Board

R.B., Appellant	)	
and	)	**Docket No. 08-248**
	)	**Issued: July 24, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Pittsburgh, PA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On October 27, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' October 31, 2006 merit decision regarding the termination of his compensation. He also filed a timely appeal of the Office's December 1, 2006 nonmerit decision denying his reconsideration request. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation effective March 20, 2005 on the grounds that he refused an offer of suitable work; and (2) whether the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

In August 2002, the Office accepted that appellant, a 39-year-old letter carrier, sustained a bilateral foot strain due to standing and walking for long periods at work.[1] He stopped work in May 2002 and received compensation from the Office for periods of disability. Appellant returned to light-duty work for the employing establishment on March 11, 2003 but stopped work again on April 20, 2003 complaining that his feet hurt.

Appellant received treatment for his feet problems from Dr. Charles F. Markham, an attending podiatrist, who continued to indicate that he was totally disabled. In April 2003, the Office referred appellant to Dr. Mohammed Imani, a podiatrist, for further evaluation of his feet problems and his ability to work. On April 22, 2003 Dr. Imani diagnosed bilateral tarsal tunnel syndrome causing end of the day heel pain and tingling in the plantar aspects of the feet, tailor's bunion, metatarsus adductus, capsulitis and hammertoe of toes four and five bilaterally. He indicated that appellant's diagnoses were not work related or due to any other injury but rather were due to structural deformities of the feet. Dr. Imani stated that he did not "recommend disability due to injury" and completed a May 1, 2003 form report in which he indicated that appellant could work eight hours per day without any limitations on activities "as tolerated."[2] On May 15, 2003 Dr. Markham indicated that he disagreed with Dr. Imani's opinion that appellant could return to regular full-time work.[3]

In May 2004, the Office determined that there was a conflict in the medical opinion between Dr. Markham and Dr. Imani regarding appellant's ability to work. In order to resolve the conflict, the Office referred appellant to Dr. Francis M. Saldanha, a podiatrist, for an impartial medical examination and an opinion on the matter.[4] On May 26, 2004 Dr. Saldanha stated that appellant's clinical examination was within normal limits in that there was absolutely no clinical evidence of any significant neuropathic pain state, complex regional pain syndrome neuroma formation or severe plantar fasciitis. He posited that appellant suffered from the residual affects of a chronic strain of both ankle joints and feet. Dr. Saldanha noted that appellant was able to perform standard office work that included walking around the office as

[1] Appellant's job required him to stand or walk for eight hours per day and to lift up to 70 pounds.

[2] Dr. Imani stated that appellant "is probably a malingerer."

[3] On April 22, 2004 Dr. Markham indicated that appellant could only perform limited-duty work for the employing establishment, including lifting no more than 15 pounds and standing or walking for no more than two hours per day. Appellant also began to be treated by Dr. Ahmet Ozturk, a podiatrist. On March 12, 2004 Dr. Ozturk indicated that appellant had a bilateral plantar neuropathy, that he had either sacroiliac joint or lower facet syndrome and that tarsal tunnel syndrome could not be ruled out. He did not provide any opinion on appellant's ability to work.

[4] The record contains March 2004 x-rays of appellant's ankles and feet which show normal findings.

long as he did not have to engage in "prolonged or excessive" walking such as walking several miles per day as he had done during his mail carrier job.[5]

On December 15, 2004 the employing establishment offered appellant a job as a modified letter carrier. The job involved sorting letters, flats and parcels. Appellant could sit or stand while sorting letters or flat but would only have to stand up to one hour per day to sort parcels. He would have to intermittently lift up to 35 pounds but the job involved minimal pushing and pulling. Appellant would not have to engage in "prolonged or excessive" walking and his medical and physical restrictions would be updated at least once per year. On December 27, 2004 appellant advised the employing establishment that he could not perform the offered position because he would be required to place pressure on his feet while maintaining his balance on a stool. He submitted numerous medical notes, dated beginning December 2004, in which Dr. Ozturk discussed the treatment of his feet problems. Dr. Ozturk indicated that appellant reported pain in his feet but he did not provide any opinion on his ability to work.

The Office provided a description of the modified letter carrier position to Dr. Saldanha and asked him to provide an opinion about appellant's ability to perform the job. On January 13, 2005 Dr. Saldanha indicated that he had reviewed his May 26, 2004 report and the job description and stated:

> "It appears that [appellant] may either sit or stand at the letter case in order to retrieve his mail and he is required to stand or sort parcels for approximately one hour per day. The job requires the ability to sit or stand and to perform simple grasping and fine manipulation, no lifting over 35 pounds on a regular basis. There is minimal pushing and puling. The position does not involve prolonged and excessive walking. Furthermore, he will be required to update his medical and physical restrictions at least once a year.
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> "Having reviewed in thorough his job description and the independent medical report that I performed earlier, I do believe that this job is suitable for [appellant] from a medical perspective."

In a January 24, 2005 letter, the Office advised appellant of its determination that the position offered by the employing establishment was suitable. It informed appellant that his compensation would be terminated if he did not accept the position or provide good cause for not doing so within 30 days of the date of the letter. Appellant continued to submit reports in which Dr. Ozturk discussed the treatment of his feet problems. In a February 25, 2005 letter, the Office advised appellant that his reasons for not accepting the position offered by the employing establishment were unjustified. It informed appellant that his compensation would be terminated if he did not accept the position within 15 days of the date of the letter.

[5] Dr. Ozturk indicated that appellant had total disability for periods between June and September 2004, but he did not indicate that he had total disability after that date. On October 5, 2004 he stated that appellant could lift up to 70 pounds, stand for up to one hour and walk for up to three hours. On September 8, 2004 Dr. Bill P. May, an attending podiatrist, noted that appellant could lift up to 15 pounds, stand for up to two hours and walk for up to two hours. On November 10, 2004 Dr. May indicated that appellant could return to regular duty on March 10, 2005.

In a March 12, 2005 letter, appellant advised the Office that he was formally protesting the modified letter carrier position because he was physically unable to perform it and because the job offered violated the agreement between labor and management. The record also contains a document in which appellant indicated that he was accepting the job "under protest."[6]

In a March 18, 2005 decision, the Office terminated appellant's compensation effective March 20, 2005 on the grounds that he refused an offer of suitable work. The Office found that the weight of the medical evidence regarding appellant's ability to perform the modified letter carrier position rested with the opinion of Dr. Saldanha, the impartial medical specialist.

Appellant requested a hearing before an Office hearing representative. At the October 24, 2005 hearing, he testified that he had in fact accepted that position offered by the employing establishment. Appellant asserted that the employing establishment had indicated that it would call him about returning to work but never did so. He submitted an August 17, 2005 statement in which his union representative discussed a March 11, 2005 meeting with management. The representative indicated that appellant's application for disability retirement was discussed and that a management official indicated that he should "go home and wait for his [tele]phone call before reporting to work" because additional clarification of his situation was needed. In a February 1, 2006 decision, the Office hearing representative affirmed the Office's March 18, 2005 decision.

Appellant submitted additional reports of Dr. Ozturk as well as an April 25, 2006 report in which Dr. May indicated that he could not perform the offered limited-duty position due to his "inability to endure more than a few minutes of activity." In an October 31, 2006 decision, the Office affirmed its prior decisions regarding the termination of appellant's compensation.

In a November 14, 2006 letter, appellant requested reconsideration of his claim. He argued that he was physically unable to perform the offered position and that he was not given a date and time to return to work after accepting the position. Appellant submitted a July 19, 2006 report of Dr. Ozturk and also submitted an October 24, 2006 report in which Dr. Ozturk discussed the treatment of his feet problems. In a December 1, 2006 decision, the Office denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).[7]

LEGAL PRECEDENT -- ISSUE 1

Section 8106(c)(2) of the Federal Employees' Compensation Act provides in pertinent part, "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[8] However, to justify such termination, the Office must show that the work offered was suitable.[9] An employee who refuses or neglects to work

[6] The record contains a fax transmittal sheet which indicates that this document was sent to the employing establishment on March 11, 2005.

[7] Appellant submitted additional evidence after the Office's December 1, 2006 decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

[8] 5 U.S.C. § 8106(c)(2).

[9] *David P. Camacho,* 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[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] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[12] In situations where 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.[13]

ANALYSIS -- ISSUE 1

In August 2002, the Office accepted that appellant sustained a bilateral foot strain due to standing and walking for long periods at work and paid compensation for periods of disability. In a March 18, 2005 decision, it terminated appellant's compensation effective March 20, 2005 on the grounds that he refused an offer of suitable work.

The Board finds that the evidence of record shows that appellant was capable of performing the modified letter carrier position offered by the employing establishment in December 2004 and determined to be suitable by the Office in January 2006. The position involved sorting letters, flats and parcels. Appellant could sit or stand while sorting letters or flats but would only have to stand up to one hour per day to sort parcels. He would have to intermittently lift up to 35 pounds but would not have to engage in "prolonged or excessive" walking.[14]

The Office properly determined that there was a conflict in the medical opinion between Dr. Markham, appellant's attending podiatrist, and the government physician, Dr. Imani, a podiatrist acting as an Office referral physician, on the extent of his ability to work. In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the

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[10] 20 C.F.R. § 10.124; *see Catherine G. Hammond*, 41 ECAB 375, 385 (1990). An offered position generally will not be suitable if it is temporary or seasonal in nature. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4b (July 1997).

[11] 5 U.S.C. § 8123(a).

[12] *William C. Bush*, 40 ECAB 1064, 1075 (1989).

[13] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980). The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant and must be one of reasonable medical certainty. *See Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

[14] The record does not reveal that the offered position was temporary or seasonal in nature. *See supra* note 10.

Act, to Dr. Saldanha, a podiatrist, for an impartial medical examination and an opinion on the matter.[15]

The Board finds that, in determining that appellant is physically capable of performing the modified letter carrier position, the Office properly relied on the opinion of Dr. Saldanha, the impartial medical specialist selected to resolve the conflict in the medical opinion. The weight of the medical evidence regarding appellant's ability to work around the time the job was offered is represented by the thorough, well-rationalized opinion of Dr. Saldanha.[16] On January 13, 2005 Dr. Saldanha provided a complete and accurate description of the modified letter carrier position and determined that appellant was able to perform it. He explained this determination by indicating that he had reviewed his earlier examination findings and found that they supported that appellant could perform the offered position.[17]

The Board notes that, therefore, the Office has established that the modified letter carrier position offered by the employing establishment is suitable. As noted above, once the Office has established that a particular position is suitable, an employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified. The Board has carefully reviewed the evidence and argument submitted by appellant in support of his refusal of the position and notes that it is not sufficient to justify his refusal of the position.

Appellant submitted numerous reports of Dr. Ozturk dated between December 2004 and August 2006. However, none of these reports provided any indication that he was unable to perform the modified carrier position around the time it was offered in late 2004. The record also contains a September 8, 2004 report, in which Dr. May, an attending podiatrist, stated that appellant could only lift up to 15 pounds and a April 25, 2006 report, in which Dr. May indicated that he could not perform the offered position due to his "inability to endure more than a few minutes of activity." However, neither of these reports provides a clear picture of appellant's ability to work around the time the modified letter carrier position was offered. In addition, Dr. May did not provide any medical rational in support of his opinions.[18] Therefore, these reports would not create a new conflict in the medical evidence or otherwise disturb the above-described resting of the weight of the medical evidence with the opinion of Dr. Saldanha.

Appellant also argued that he in fact accepted the modified letter carrier position. However, the record does not provide any indication that he accepted the position and returned to

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[15] *See supra* notes 11 and 12 and accompanying text. In May 15, 2003 and April 22, 2004 reports, Dr. Markham indicated that appellant could not return to regular full-time work. In contrast Dr. Imani determined in March 22 and May 1, 2003 reports that appellant could work eight hours per day without any limitations on activities.

[16] *See supra* note 13 and accompanying text.

[17] Dr. Saldanha did not indicate that the medical evidence of record showed that appellant sustained any worsening of the condition of his feet since the examination in May 2004. The Board has reviewed the medical evidence of record from mid to late 2004 and notes that it does not show any notable change in appellant's reported symptoms or objective findings.

[18] For example, it is unclear why Dr. May recommended lifting restrictions given that appellant did not have any notable upper extremity condition.

work within the time period allotted by the Office.[19] Appellant submitted a statement in which a union representative asserted that during a March 11, 2005 meeting a management official indicated that he should "go home and wait for his [tele]phone call before reporting to work" because additional clarification of his situation was needed. However, this statement is vague in nature and does not show that he actually accepted the position within the time allotted.[20]

For these reasons, the Office properly terminated appellant compensation effective March 20, 2005 on the grounds that he refused an offer of suitable work.[21]

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[22] the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[23] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[24] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[25] The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record[26] and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[27]

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[19] In a February 25, 2005 letter, the Office advised appellant that his reasons for not accepting the position offered by the employing establishment were unjustified. It informed appellant that his compensation would be terminated if he did not accept the position within 15 days of the date of the letter. Appellant did not accept the position or return to work before the Office issued its termination decision on March 18, 2005.

[20] The Board notes that the record contains a March 12, 2005 statement in which appellant continued to "protest" the modified letter carrier position.

[21] The Board notes that the Office complied with its procedural requirements prior to terminating appellant's compensation, including providing him with an opportunity to accept the modified letter carrier position after informing him that his reasons for initially refusing the position were not valid; *see generally Maggie L. Moore*, 42 ECAB 484 (1991); *reef's on recon.*, 43 ECAB 818 (1992).

[22] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[23] 20 C.F.R. § 10.606(b)(2).

[24] *Id*. at § 10.607(a).

[25] *Id*. at § 10.608(b).

[26] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

[27] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

ANALYSIS -- ISSUE 2

In a November 14, 2006 letter, appellant requested reconsideration of his claim. He argued that he was physically unable to perform the offered position and that he was not given a date and time to return to work after accepting the position. The submission of this argument would not require reopening of appellant's claim for merit review because he previously submitted these arguments and the Office has already considered and rejected them.[28] Appellant also submitted an October 24, 2006 report of Dr. Ozturk, but submission of this report would not require reopening of his claim for merit review because it is not relevant to the main issue of the present case.[29] This report provides no opinion on whether appellant was able to perform the modified carrier position around the time it was offered in late 2004.

Appellant has not established that the Office improperly denied his request for further review of the merits of its October 31, 2006 decision under section 8128(a) of the Act, because the evidence and argument he submitted did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or constitute relevant and pertinent new evidence not previously considered by the Office.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation effective March 20, 2005 on the grounds that he refused an offer of suitable work. The Board further finds that the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[28] *See supra* note 26 and accompanying text. Appellant also submitted a July 19, 2006 report of Dr. Ozturk, but this report had already been considered by the Office.

[29] *See supra* note 27 and accompanying text.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' December 1 and October 31, 2006 decisions are affirmed.

Issued: July 24, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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