United States Department of Labor
Employees' Compensation Appeals Board

L.M., Appellant	)	
and	)	**Docket No. 09-8**
	)	**Issued: August 5, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Fort Worth, TX, 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 September 30, 2008 appellant filed a timely appeal from a January 8, 2008 decision of the Office of Workers' Compensation Programs terminating his monetary compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether the Office properly terminated appellant's monetary compensation benefits effective January 20, 2008 under section 8106(c) of the Federal Employees' Compensation Act on the grounds that he refused an offer of suitable work.

FACTUAL HISTORY

The Office accepted that on or before June 20, 2000 appellant, then a 45-year-old mail handler, sustained right shoulder impingement syndrome, brachial neuritis/radiculitis, cervical radiculopathy, cervical disc displacement, cervical spondylosis, bilateral carpal tunnel syndrome,

bilateral median and ulnar nerve lesions and derangement of the joints of both hands.[1] He performed limited-duty work beginning in October 2001. Appellant stopped work on September 8, 2005 and underwent subacromial decompression of the right shoulder on September 9, 2005. He did not return to work.

Dr. Charles D. Marable, an attending Board-certified neurologist, submitted reports from August 2004 to May 2006 finding that appellant was totally disabled for work due to cervical spondylosis, bilateral carpal tunnel syndrome, bilateral median and ulnar nerve pathologies and right rotator cuff impingement. Appellant was also treated by Dr. Jacob Rosenstein, an attending Board-certified neurosurgeon, who submitted reports from February to December 2006 diagnosing bilateral cervical radiculopathy and recommending an anterior cervical fusion.[2] On December 21, 2006 Dr. Rosenstein performed a C6-7 anterior discectomy and fusion, approved by the Office. Both Dr. Marable and Dr. Rosenstein advised that appellant was totally disabled for work.

The Office obtained a second opinion report from Dr. Robert E. Holladay, IV, a Board-certified orthopedic surgeon. In a May 30, 2007 report, Dr. Holladay reviewed the medical record and a statement of accepted facts. He diagnosed bilateral medial epicondylitis and post surgical status. Dr. Holladay opined that appellant could perform full-time sedentary duty with physical restrictions.

The Office found a conflict of medical opinion between Drs. Marable and Rosenstein, for appellant, and Dr. Holladay, for the government. To resolve the conflict, the Office referred appellant, the medical record and statement of accepted facts, to Dr. David R. Willhoite, a Board-certified orthopedic surgeon. In an August 6, 2007 report, Dr. Willhoite reviewed the medical record and statement of accepted facts. On examination, he found upper extremity paresthesias consistent with compression neuropathies. Dr. Willhoite diagnosed status post anterior C6-7 discectomy and fusion, medial epicondylitis and cubital tunnel syndrome of the right elbow. He obtained a functional capacity evaluation on September 7, 2007, which demonstrated a sedentary work capacity. In a September 27, 2007 report, Dr. Willhoite found that appellant was capable of performing full-time sedentary duty. He limited pushing and pulling to 10 pounds and lifting to 5 pounds. Appellant could sit, stand and perform simple grasping for up to eight hours a day. He could squat, kneel and reach above the shoulder for one hour.

In an August 23, 2007 report, Dr. Rosenstein diagnosed bilateral epicondylitis and post-surgical neck pain. In an October 4, 2007 report, Dr. Marable found appellant totally disabled for work due to the accepted neck and upper extremity conditions.

On November 9, 2007 the employing establishment offered appellant a full-time, limited-duty job as a modified mail handler effective November 26, 2007. The position involved

[1] The Office initially denied appellant's claim by decision dated July 8, 2005. It vacated this decision and accepted the claim on November 23, 2005.

[2] In a June 27, 2006 report, Dr. Robert Chouteau, an osteopathic physician Board-certified in orthopedic surgery and a second opinion physician, concurred with Dr. Rosenstein's recommendation for anterior cervical fusion.

scanning mail for eight hours a day. The job required intermittent sitting, standing, walking and simple grasping for eight hours a day and reaching above the shoulder for one hour. Lifting was limited to 5 pounds and pushing and pulling to 10 pounds.

In a November 19, 2007 letter, the Office advised appellant that the offered modified mail handler position was found suitable work within his medical restrictions. It afforded appellant 30 days in which to either accept the position or provide good cause for refusal. The Office also advised appellant that, under section 8106(c) of the Act, he would lose his entitlement to compensation if he refused suitable work.

On November 23, 2007 appellant refused the offered position, noting that the Office of Personnel Management approved his application for disability retirement on November 1, 2007. He submitted November 21 and December 19, 2007 reports from Dr. Marable, finding appellant totally disabled for work due to the accepted conditions. Appellant also submitted a November 21, 2007 report from Dr. Rosenstein noting postsurgical neck pain.

On November 26, 2007 the Office verified that the offered modified mail handler position remained available.

In a December 11, 2007 letter, the Office advised appellant that the offered position was still found to be suitable work and remained available. It afforded him 15 days to accept the position or incur the termination of his compensation benefits. The Office stated that no further reasons for refusal would be considered.

In a December 12, 2007 letter, appellant contended his retirement was a valid reason for refusing the offered modified mail handler position. He submitted December 20, 2007 reports from Dr. Stephen L. Wilson, an attending Board-certified orthopedic surgeon, recommending surgery for progressive cubital tunnel syndrome with ulnar neuropraxia and grip strength deficits.

By decision dated January 8, 2008, the Office terminated appellant's monetary compensation benefits effective January 20, 2008 under section 8106(c), on the grounds that he refused an offer of suitable work. It found that appellant received proper notice that the offered position was suitable work. The Office further found that appellant did not provide good cause for refusing the position, which remained open and available to him. It further found that the position was within the restrictions prescribed by Dr. Willhoite on September 27, 2007. The Office noted that the additional medical evidence submitted from Drs. Marable, Rosenstein and Wilson was insufficient to outweigh Dr. Willhoite's opinion.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[3] In this case, it terminated appellant's compensation under section 8106(c)(2) of the Act, which provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the

[3] *Linda D. Guerrero*, 54 ECAB 556 (2003); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

employee is not entitled to compensation."[4] To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[5] 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.[6]

Section 10.517(a) of the Act's implementing regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured by the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.[7] Pursuant to section 10.516, the employee shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.[8]

Section 8123(a) of the Act provides that, when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[9] When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.[10] In situations where the case is referred to an impartial medical specialist to resolve a conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[11]

ANALYSIS

The Office terminated appellant's monetary compensation benefits effective January 20, 2008 on the grounds that he refused a November 9, 2007 offer of suitable work. It found that the weight of the medical evidence established that the position was within appellant's physical capabilities. This evidence included a September 7, 2007 functional capacity evaluation performed for and reviewed by Dr. Willhoite, a Board-certified orthopedic surgeon and impartial medical examiner. The Office accorded Dr. Willhoite's opinion special weight as he was an impartial medical specialist, his reports were well rationalized and based on a complete medical and factual background.[12]

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[4] 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

[5] *Ronald M. Jones*, 52 ECAB 190 (2000); *Arthur C. Reck*, 47 ECAB 339 (1995).

[6] *Joan F. Burke*, 54 ECAB 406 (2003); s*ee Robert Dickerson*, 46 ECAB 1002 (1995).

[7] 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 5.

[8] 20 C.F.R. § 10.516.

[9] 5 U.S.C. § 8123(a); *Robert W. Blaine*, 42 ECAB 474 (1991).

[10] *Delphia Y. Jackson*, 55 ECAB 373 (2004).

[11] *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

[12] *Id.*

Dr. Willhoite opined that, according to the September 7, 2007 functional capacity evaluation, appellant could perform the sedentary, clerical tasks required by the offered position. Appellant required restrictions against pushing or pulling more than 10 pounds, lifting more than 5 pounds and reaching above the shoulder for more than one hour. The employing establishment's November 9, 2007 job offer of a modified mail handler involved sedentary, clerical duties conforming to the restrictions specified by Dr. Willhoite. The listed restrictions limited lifting to five pounds, pushing and pulling to ten pounds and reaching above the shoulder up to one hour. The Board finds that these restrictions are within the limitations set forth by Dr. Willhoite, based on the results of the September 7, 2007 functional capacity evaluation. Therefore, the Board finds that the position offered appellant on November 9, 2007 was suitable work within appellant's physical capabilities.

Appellant provided additional medical evidence after the submission of Dr. Willhoite's reports. Dr. Rosenstein, an attending Board-certified neurosurgeon and Dr. Marable, an attending Board-certified neurologist, submitted reports from August to December 2007 reiterating previous findings. The Board finds that these reports are not sufficient to overcome the special weight afforded to Dr. Willhoite's opinion. Dr. Marable and Dr. Rosenstein were on one side of the resolved conflict and did not provide any new rationale to support their opinions.[13] In December 20, 2007 reports, Dr. Wilson, an attending Board-certified orthopedic surgeon, recommended surgery for cubital tunnel syndrome. However, he did not opine that appellant could not perform the offered modified mail handler position or that it was otherwise unsuitable. The Board therefore finds that Dr. Willhoite's opinion continues to carry the weight of the medical evidence.

Appellant rejected the offered position on November 23, 2007, asserting that his disability retirement application was approved. Retirement, however, is not considered an acceptable reason for refusing an offer of suitable work.[14]

The Office properly advised appellant by December 11, 2007 letter that his reasons for refusing the offered position were not valid and that he must either accept the position within 15 days or face termination of his compensation benefits. However, appellant did not accept the position. As the weight of the medical evidence at the time of the January 8, 2008 decision established that appellant could perform the duties of the offered position, he did not offer sufficient justification for refusing the job. Therefore, the Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective January 20, 2008 as he refused an offer of suitable work.[15]

[13] A physician on one-side of a conflict in medical opinion that is resolved by an impartial medical examiner cannot come back and create a new conflict without submitting new rationale or medical evidence to support his opinion. *See Dorothy Sidwell*, 41 ECAB 857 (1990).

[14] *Robert P. Mitchell*, 52 ECAB 116 (2000) (where the claimant chose to receive disability retirement benefits rather than accept a position offered by the employing establishment).

[15] *Karen L. Yaeger*, 54 ECAB 323 (2003).

CONCLUSION

The Board finds that the Office properly terminated appellant's monetary compensation benefits effective January 20, 2008 on the grounds that he refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 8, 2008 is affirmed.

Issued: August 5, 2009
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