United States Department of Labor
Employees' Compensation Appeals Board

M.K., Appellant	)	
and	)	**Docket No. 09-1385**
	)	**Issued: March 9, 2010**
U.S. POSTAL SERVICE, TIMES PLAZA STATION, Brooklyn, NY, Employer	)	

Appearances:
Greg Dixon, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 20, 2008 appellant filed an appeal of the October 8, 2008 and April 14, 2009 decisions of the Office of Workers' Compensation Programs that terminated his wage-loss compensation on the grounds that he refused an offer of 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 benefits effective October 11, 2008 pursuant to 5 U.S.C. § 8106.

On appeal, appellant's representative asserts that the opinion of the impartial specialist is insufficient and that the offered modified letter carrier position was not suitable.

FACTUAL HISTORY

On May 6, 1999 appellant, then a 46-year-old letter carrier, sustained an employment-related lumbar strain when he injured his back pulling buckets of mail. He stopped work that day and returned to modified duty on October 14, 1999. Appellant missed intermittent periods

thereafter and the claim was expanded to include lumbar radiculopathy. On September 18, 2004 he sustained a recurrence of disability that was accepted by the Office. Appellant was placed on the periodic rolls.

A lower extremity electromyographic (EMG) and nerve conduction study (NCS) on January 21, 2005, conducted by Dr. Leonard A. Langman, a neurologist, was interpreted as abnormal with evidence of bilateral L4-5 and left L5-S1 lumbosacral radiculopathies. A magnetic resonance imaging (MRI) scan on January 25, 2005 demonstrated a small central disc herniation at L4-5 with moderate foraminal encroachment and a small disc osteophyte complex at L3-4. On March 16, 2005 Dr. Langman provided examination findings and diagnosed lumbar radiculopathy. He advised that appellant was totally disabled. Dr. Leo E. Batash, a physiatrist, provided reports in which he advised that appellant had been under his care since May 27, 1999. He diagnosed lumbosacral derangement and noted that appellant had severe restrictions to his physical activity.

On February 1, 2007 appellant was referred to Dr. Robert Israel, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a February 27, 2007 report, Dr. Israel reviewed the history of injury, medical treatment and appellant's complaints of symptoms in his back and left hip. Examination of the lumbar spine demonstrated no spasms or tenderness with straight leg raising bilaterally negative, both sitting and supine. There was no lower extremity atrophy or sensory deficit, and strength was 5/5. Left hip range of motion was normal with no sensory loss. Dr. Israel diagnosed resolved sprain of the lumbar spine. He advised that there were no objective findings of appellant's accepted back conditions and no residuals, that appellant could return to his regular letter carrier duties without restrictions and that he needed no further orthopedic care. Dr. Langman continued to advise that appellant was totally disabled. The Office determined that a conflict in medical opinion arose between Dr. Langman and Dr. Israel regarding the residuals of appellant's back condition and whether he continued to be disabled due to the work injury. On July 10, 2007 it referred appellant to Dr. Stanley Soren, a Board-certified orthopedic surgeon, for an impartial evaluation. In a July 23, 2007 report, Dr. Soren reviewed the history of injury and appellant's complaint of low back pain radiating to the right knee, worse in damp weather, with intermittent numbness of the right big toe. He reviewed the statement of accepted facts and medical records including the EMG and MRI scan findings. On physical examination, Dr. Soren noted trace right-sided paralumbar spasm and mild tenderness in the mid and right paralumbar area. Lumbar spine range of motion was decreased, and straight leg raising was negative bilaterally in the seated position, equivocal in the supine. Sensation was decreased in the first web space dorsum of the right foot. Dr. Soren diagnosed acute lumbosacral sprain, lumbar/lumbosacral radiculopathy with NCS and EMG evidence, L4-5 central disc herniation and L5 lumbar radiculopathy. He advised that the lumbar sprain had resolved but that appellant had residuals of lumbosacral radiculopathy and that up to three lumbar epidural injections could be considered. Dr. Soren concluded that, even without the epidurals, appellant could perform light duty for 8 hours a day with a restriction of 4 hours sitting, 4 hours standing, no operating a motor vehicle at work, and a 30-pound lifting restriction with 15-minute breaks twice daily.

On September 12, 2007 the employing establishment offered appellant modified duty that conformed with Dr. Soren's restrictions.[1] Appellant refused the offered position and submitted an October 18, 2007 report in which Dr. Langman advised that appellant could not perform the duties of the offered position. He stated that appellant elected not to have epidural injections and could not lift more than five pounds.

By letter dated September 20, 2007, the Office advised appellant that the modified job offer was suitable. He was notified that, if he failed to report to work or failed to demonstrate that the failure was justified, his right to compensation for wage loss or a schedule award would be terminated pursuant to section 8106(c)(2).[2] He was given 30 days to respond. In treatment notes dated August 9 to November 29, 2007, Dr. Batash noted appellant's complaint of constant pain and provided findings on examination. In reports dated September 6 to December 4, 2007, Dr. Langman advised that appellant was seen for neurological examination for chronic low back pain.

On January 25, 2008 the Office advised appellant that his reasons for refusing to accept the offered position were insufficient and he had an additional 15 days to accept the job offer. Appellant submitted a September 6, 2007 EMG study that was interpreted by Dr. Langman as abnormal with evidence of chronic right L5-S1 lumbosacral radiculopathy. In a February 1, 2008 report, Dr. Soren noted that he had reviewed the modified position and advised that, while appellant could return to part-time light-duty work, he could not work eight hours per day and could not sit or walk four hours per day, and could not push, pull or lift more than five pounds. On March 18, 2008 he advised that appellant was totally disabled. On June 25, 2008 the employing establishment advised that the modified position was still available. On June 30, 2008 Dr. Soren noted his review of the modified position. Based on his findings on July 23, 2007, appellant was capable of performing the full-time light-duty job.

In an August 18, 2008 letter, the Office again advised appellant that the position offered was suitable and available. Appellant was notified of the penalty provisions of section 8106 of the Federal Employees' Compensation Act and given 30 days to respond. He rejected the offered position on September 9, 2008, stating that he could not lift more than 10 pounds. In reports dated June 17 to August 12, 2008, Dr. Batash advised that appellant was seen for examination and treatment. In reports dated June 24 and August 26, 2008, Dr. Langman noted that appellant was seen. On September 19, 2008 the Office advised appellant that the reasons given for refusing to accept the offered position were insufficient and he was given an additional 15 days to accept. Appellant disagreed that the offered position was suitable, stating that he was in severe pain. He submitted a June 24, 2008 EMG study interpreted by Dr. Langman as abnormal with evidence of chronic right L5-S1 lumbosacral radiculopathy and coexistent left tibialis neuropathy. In a September 30, 2008 report, Dr. Langman reiterated his conclusion that appellant could not perform the modified assignment.

[1] The modified assignment was a full-time carrier/technician position with duties of casing mail and tie-out no more than four hours daily; street delivery no more than four hours daily; with physical requirements of sitting and walking four hours each; twisting up to two hours; pulling and pushing 30 pounds for four hours; and lifting no more than 30 pounds with two 15-minute breaks per day and no operating a motor vehicle at work.

[2] 5 U.S.C. § 8106(c)(2).

By decision dated October 8, 2008, the Office terminated appellant's wage-loss compensation on the grounds that he refused an offer of suitable work.

On October 31, 2008 appellant requested a hearing. He submitted evidence previously of record and reports dated September 30 to December 2, 2008 in which Dr. Batash advised that appellant was seen for examination and treatment. In reports dated September 30 to December 18, 2008, Dr. Langman advised that appellant was seen for neurological evaluation. In a work capacity evaluation dated October 7, 2008, Dr. Batash diagnosed lumbosacral sprain, radiculopathy with radiation and numbness, and L4-5 disc herniation. He advised that appellant could not perform his usual job and provided restrictions that appellant could sit, walk, stand, reach, bend, squat and climb for one hour daily, operate a motor vehicle for two hours daily, and push, pull and lift five pounds with no kneeling. Dr. Batash noted that appellant was using a strong pain killer with side effects of drowsiness and dizziness.

At the hearing held on February 25, 2009, appellant contended that he could not perform the carrier duties that were included in the modified job offer. Dr. Langman testified that appellant had neurological findings consistent with a diagnosis of disc herniation and radiculopathy and that he could not perform the modified-duty position. Appellant addressed his postal route prior to his May 6, 1999 injury. In reports dated January 6 and February 23, 2009, Dr. Langman advised that appellant had been seen for follow-up. The January 27 and February 12, 2009 reports of Dr. Batash advised that appellant was seen for examination and treatment. In a March 13, 2009 letter, the employing establishment noted that the modified position offered appellant was within the physical restrictions provided by Dr. Soren.

By decision dated April 14, 2009, an Office hearing representative affirmed the October 8, 2008 decision.

LEGAL PRECEDENT

Section 8106(c) of the 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."[3] It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[4] The implementing regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.[5] To support termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[6] In determining what constitutes "suitable work" for a particular

[3] *Id.* at § 8106(c).

[4] *Joyce M. Doll*, 53 ECAB 790 (2002).

[5] 20 C.F.R. § 10.517(a).

[6] *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

disabled employee, the Office considers the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors.[7] Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.[8] 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.[9]

The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence.[10] It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.[11]

Section 8123(a) of the Act provides that, 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.[12] When 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 on a proper factual background, must be given special weight.[13]

ANALYSIS

The Office terminated appellant's monetary compensation effective October 11, 2008 on the grounds that he refused a June 25, 2008 offer of suitable work. It found that the weight of the medical evidence established that the position was within appellant's physical capabilities, based on the referee opinion of Dr. Soren. The Office found that a conflict in medical opinion arose between Dr. Langman, an attending neurologist, and Dr. Israel, a Board-certified orthopedic surgeon, who performed a second opinion evaluation for the Office.

In a July 10, 2007 report, Dr. Soren provided examination findings and diagnosed acute lumbosacral sprain, lumbar/lumbosacral radiculopathy, L4-5 central disc herniation and L5 lumbar radiculopathy. He advised that the lumbar sprain had resolved but that appellant had residuals of lumbosacral radiculopathy and concluded that appellant could perform light duty for 8 hours daily with a restriction of 4 hours sitting, 4 hours standing, no operating a motor vehicle at work, and a 30-pound lifting restriction with 15-minute breaks twice daily. In job offers dated

[7] 20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB 681 (2004).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5.a(1) (July 1997); *see Lorraine C. Hall*, 51 ECAB 477 (2000).

[9] *Gloria G. Godfrey*, 52 ECAB 486 (2001).

[10] *Gayle Harris*, 52 ECAB 319 (2001).

[11] *Richard P. Cortes*, 56 ECAB 200 (2004).

[12] 5 U.S.C. § 8123(a); *see Geraldine Foster*, 54 ECAB 435 (2003).

[13] *Manuel Gill*, 52 ECAB 282 (2001).

September 12, 2007 and June 25, 2008, the employing establishment offered appellant a modified letter carrier position that comported with the restrictions provided by Dr. Soren[14] and in a June 30, 2008 report, Dr. Soren advised that he had reviewed the job offer and appellant was capable of performing the position full time. The Board therefore finds that, based on Dr. Soren's July 10, 2007 and June 30, 2008 reports, the position offered appellant on June 25, 2008 was suitable work within his physical capabilities.

Following Dr. Soren's July 10, 2007 evaluation, appellant submitted additional medical reports from Drs. Langman and Batash. The Board, however, finds these reports are not sufficient to overcome the special weight afforded Dr. Soren. Dr. Langman advised that appellant was seen for neurological evaluation and reiterated that appellant could not perform the duties of the offered position. These subsequent reports of Dr. Langman were lacking in rationale on the issue of appellant's incapacity for the selected position. The Board finds Dr. Langman's reports insufficient to overcome the special weight accorded Dr. Soren as an impartial medical specialist.

Dr. Batash's reports are also insufficient to overcome Dr. Soren's evaluation. In his reports, he noted appellant's complaint of constant pain, provided examination findings and advised that appellant had been seen for examination and treatment. Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[15] Dr. Batash did not provide a rationalized explanation as to why appellant could not perform the modified position or explain why the position offered was not suitable. The Board finds his reports do not contain sufficient rationale and are of diminished probative value.[16]

Dr. Soren reviewed appellant's complete medical history and provided a well-rationalized evaluation in which he clearly advised that appellant could return to modified duty. His opinion is entitled to the special weight accorded an impartial examiner and therefore constitutes the weight of the medical evidence.[17]

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 appellant an opportunity to accept or provide reasons for declining the position.[18] The record in this case indicates that the Office properly followed the procedural requirements. By

[14] *Supra* note 1.

[15] *Sedi L. Graham*, 57 ECAB 494 (2006).

[16] *See S.S.*, 59 ECAB ____ (Docket No. 07-579, issued January 14, 2008).

[17] *See Sharyn D. Bannick*, 54 ECAB 537 (2003).

[18] *See Maggie L. Moore*, *supra* note 6.

letter dated August 18, 2008, the Office advised appellant that the offered position was suitable. He was notified that, if he failed to report to work or failed to demonstrate that the failure was justified, his right to monetary compensation would be terminated, and he was allotted 30 days to either accept or provide reasons for refusing the position. On September 19, 2008 the Office advised appellant that the reasons given for not accepting the job offer were unacceptable, and he was given an additional 15 days in which to respond. There is, therefore, no evidence of a procedural defect in this case as the Office provided appellant with proper notice. He was offered a suitable position by the employing establishment and such offer was refused. Under section 8106 of the Act, appellant's monetary compensation was properly terminated effective October 11, 2008 on the grounds that he refused an offer of suitable work.[19]

After the Office established that the offered work is suitable, the burden shifted to appellant to show that his refusal of suitable work was reasonable or justified.[20] Appellant submitted additional reports from Dr. Batash who noted examination findings but provided no opinion regarding the offered position. Dr. Batash also provided an October 7, 2008 work capacity evaluation in which he advised that appellant could not perform his usual job and provided strict restrictions that appellant could only sit, walk, stand, reach, bend, squat and climb for one hour daily and that appellant was using strong medications. The Board, however, finds this report insufficient to establish the offered position unsuitable because Dr. Batash did not provide any findings or rationale to explain why appellant could not perform the duties of the modified position.[21]

Dr. Langman testified at the hearing that appellant had neurological findings consistent with a diagnosis of disc herniation and radiculopathy and that he could not perform the modified-duty position. The Board notes that Dr. Langman reiterated his opinion that had previously been considered and found to conflict with that of Dr. Israel.

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.[22] The Board finds that the Office properly terminated appellant's monetary compensation due to his refusal of suitable work and that he did not, thereafter, establish that his refusal of suitable work was justified.

CONCLUSION

The Board finds that the Office properly terminated appellant's wage-loss compensation pursuant to 5 U.S.C. § 8106(a).

[19] *Joyce M. Doll, supra* note 4.

[20] *M.S.*, 58 ECAB 328 (2007).

[21] *S.S., supra* note 16.

[22] 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 14, 2009 and October 8, 2008 be affirmed.

Issued: March 9, 2010
Washington, DC

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

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

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