United States Department of Labor
Employees' Compensation Appeals Board

L.D., Appellant	)	
and	)	**Docket No. 12-816**
	)	**Issued: April 9, 2013**
DEPARTMENT OF TRANSPORTATOIN, FEDERAL AVIATION ADMINISTRATION, Petaluma, CA, Employer	)	

Appearances:
Norman McNulty, Jr., Esq., for the appellant,
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 5, 2012 appellant, through his attorney, filed a timely appeal from the December 19, 2011 decision of the Office of Workers' Compensation Programs (OWCP), which terminated his compensation on the grounds that he refused an offer of suitable work. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 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 OWCP properly terminated appellant's compensation effective April 11, 2010 on the grounds that he refused an offer of suitable work.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 25, 1994 appellant, then a 32-year-old air traffic controller, was injured when he slipped and fell in a restroom. OWCP accepted the claim for a herniated disc at L4-5 necessitating surgery. Appellant returned to work on December 24, 1995. On June 14, 1996 he became aware that sitting aggravated his low back condition. Appellant stopped work on June 20, 1996. OWCP treated this as a new occupational disease claim and accepted it for aggravation of herniated lumbar disc with surgery. Appellant was placed on the periodic rolls and received wage-loss benefits.

Appellant underwent numerous surgeries, including a postrevision discectomy, L4 laminectomy, L4-Sl fusion, a July 1995 decompression S1 nerve root, removal of rod and screw in 1997, decompressive laminectomy at L3-4, discectomy of extruded herniated disc at L3-4, bilateral fusion at L3-4 and L4-S, an anterior fusion at L3-4, iliac crest bone graft to the interspace and removal of the disc in 1998.[2] He underwent a revision laminectomy, left side, foraminotomy, lysis of adhesions and discectomy at L2-3 on July 5, 2006. Appellant left the employing establishment and returned to work in the private sector until November 2006 when he was reemployed with the employing establishment in a full-time administrative assistant position. On April 2, 2007 OWCP issued a wage-earning capacity decision finding that his actual earnings as an administrative assistant fairly and reasonably represented his wage-earning capacity.

On August 9, 2007 appellant underwent a right-sided lumbar hemilaminotomy and foraminotomy L2-3. On October 29, 2007 he returned to his light-duty position in a telecommuting capacity. On March 10, 2008 appellant underwent posterior decompression as well as lateral, lateral fusion with hardware at L2-3. He remained off work.

On January 13, 2009 OWCP referred appellant to Dr. Robert Ferretti, a Board-certified orthopedic surgeon, for a second opinion. In a January 29, 2009 report, Dr. Ferretti noted appellant's history of treatment and examined him. Appellant ambulated with a brisk gait and a noticeable right leg limp, which was most likely related to a degree of right leg weakness. Range of motion of the back included flexion limited to 35 degrees and extension of 0 degrees. There was no pain during the demonstrated degrees of range of motion. Dr. Ferretti diagnosed aggravation of a lumbar herniated disc with additional back surgery related to his June 14, 1996 work injury. He opined that appellant had physical limitations resulting from his back condition as well as restrictions attributable to a permanent aggravation of the preexisting conditions. The limitations included: sitting for four to six hours; walking two to three hours; standing for two to three hours; twisting bending and stooping for one to two hours; pushing and pulling for four hours up to 20 pounds; lifting for four hours up to 10 pounds; squatting for one hour; kneeling for one hour; climbing for two hours and a five-minute break from sitting each one third of an hour. Dr. Ferretti explained that the administrative assistant position he had been doing was

[2] Appellant had a preexisting fusion in June 1991.

accepable, but that appellant was unable to drive from his location in Petaluma, CA to Fremont, CA, due to a distance of greater than one hour.[3]

On April 29, 2009 OWCP requested that Dr. Ferretti address further the commute between Petaluma and Fremont, CA. It requested that he provide an opinion regarding whether appellant was able to drive or commute by public transportation. In a May 11, 2009 supplemental report, Dr. Ferretti stated that appellant could perform the duties of the modified job but noted that the location of the facility was in Fremont, CA and he lived in Petaluma, CA which was over a one hour one-way commute. He reiterated that he would "recommend no commuting/driving over one-half hour at a time." Dr. Ferretti explained that appellant was able to drive and could commute by public transportation or otherwise. He reiterated the physical restrictions and also noted that appellant should be considered able to commute to work. Dr. Ferretti noted that, to solve low back pain with sitting, appellant could get up from a sitting position every half hour whether he was driving himself or taking public transportation. This would be for a brief period of time, no greater than 5 to 10 minutes and he could then sit during the remainder of his commute, either driving or in public transportation, which would enable him to work a sedentary job as administrative assistant.

In a May 20, 2009 letter to appellant's treating physician, Dr. Robert Harf, a treating Board-certified orthopedic surgeon, OWCP provided a copy of Dr. Ferretti's report and requested his opinion. In a June 17, 2009 response, he noted that the physicians had discussed appellant's driving and he opined that he did not want him "driving more than a half-hour at a time."

An August 14, 2009 conference call was held by OWCP, with Ann Purcell of the employing establishment and the rehabilitation counselor, addressing appellant's capacity to work. The rehabilitation counselor advised OWCP that appellant had applied for management positions at both the Santa Rosa and Napa airports, which were close to his home. However, Ms. Purcell stated that there was no time frame as to when a decision would be made, and appellant "must still interview for the jobs." The claims examiner noted that OWCP could not wait for that interview and hiring process to be completed and inquired as to whether appellant's former job at the Fremont airport was still available. Ms. Purcell explained that it might be but that appellant was "disqualified from working in the tower as an air traffic controller because of the medications he was taking." The discussion considered whether a job at the Oakland airport was possible as it was closer to appellant's residence. It was determined that, based upon Dr. Ferretti's May 11, 2009 supplemental report, appellant was capable of commuting to most applicable Bay area jobs and that commuting should not be an issue when developing a job offer.

On September 11, 2009 appellant was offered a full-time light-duty position as an administrative support specialist in Fremont, CA. The physical requirements included: intermittent sitting six hours a day and standing/walking up to three hours a day. The offer indicated that the employee would "have the ability to sit and stand, at will, for personal comfort." The position also included: lifting, pushing and pulling of packages and paper (no

[3] OWCP asked Dr. Ferretti to address whether appellant could work as an administrative assistant in Fremont, CA.

more than five pounds). The employing establishment confirmed that the position complied with Dr. Ferretti's restrictions and was currently available to appellant.

In an October 1, 2009 letter, counsel responded that appellant wanted to work but he was declining the job offer due to the commuting distance. He noted that round trip from appellant's home in Petaluma to Fremont, CA was approximately 140 miles. Counsel explained that it would be impossible for appellant to sit and operate a car between Petaluma and Fremont, CA as the pain and discomfort in his back would be too great. He noted that appellant took prescription medications which created adverse side-effects that included sleepiness. Counsel stated that appellant would consider a job within a reasonable driving distance of his residence. In an October 27, 2009 telephone call memorandum, the employing establishment confirmed that the position was still available to appellant.

By letter dated November 5, 2009, OWCP advised appellant of the suitability of the modified position. Appellant was advised that he should accept the position or provide an explanation for refusing the position within 30 days. OWCP informed him that if he failed to accept the offered position without justification, his compensation would be terminated.

In a November 18, 2009 report, Dr. Michael Tran, Board-certified in pain medicine, noted appellant's history, including extensive lumbar spine surgery from L1-2 to the sacrum area with fusion. He noted that appellant recently had an aggravation with pain, mostly on the right side. Dr. Tran recommended that appellant continue with pain relief medications and prescribed Naproxen, Neurontin, Soma, Darvocet and Lidoderm.

In a November 20, 2009 report, Dr. Harf noted that appellant was seen in order to discuss his ability to drive and commute. He referred to Dr. Ferretti's report and disagreed about appellant's ability to drive. Dr. Harf explained that, as noted in a June 17, 2009 report, driving more than one half hour at a time and taking a driving break was the best appellant could do. Appellant had more than seven surgeries to his lumbar spine and would have difficulty driving in a normal passenger car and need to change positions. Dr. Harf opined that the sitting position with vibration would be problematic and appellant would have to change positions roughly every half hour. He noted that taking public transportation from Fremont to Petaluma, CA, would take over three hours of vibration and transfers of three bus lines for six hours a day. Dr. Harf also explained that appellant could not simply pull over and change positions on a high speed road.

In a December 1, 2009 statement, counsel argued that appellant could not commute over one-half hour at a time and was under medication. In a November 30, 2009 statement, appellant argued that he could not drive the distance to Fremont, CA or commute by public transportation. He argued that after 30 minutes of driving and even after a 5- or 10-minute break, his back pain resumed immediately upon driving again. OWCP received a print out of the times and costs of taking public transportation from appellant's home in Petaluma to Fremont, CA. It was noted that he would have to leave at 4:30 a.m. and would arrive 3 hours and 16 minutes later at 7:46 a.m. In the evenings, appellant would depart at 4:44 p.m. and arrive at 7:52 p.m.

By letter dated December 8, 2009, OWCP informed appellant that his reasons for refusing the position were not acceptable and allowed an additional 15 days to accept the position. Appellant was advised that Dr. Tran did not provide sufficient rationale as to why the

administrative support specialist position, in Fremont, CA was not considered suitable employment. He was advised that no further reason for refusal would be considered.

In a letter dated December 18, 2009, appellant requested a return to duty date. In a telephone call memorandum of January 25, 2010, OWCP noted that he reported for duty on January 19, 2010, but proceeded to request 220 hours of annual leave and advised the employing establishment of his choice to take "medical retirement." The record is not clear if appellant actually worked, but it was confirmed that he was present. In a memorandum of conference dated February 3, 2010, OWCP noted that the conference was held to explain the consequences of the impending suitability determination.

In an April 9, 2010 decision, OWCP terminated appellant's monetary compensation benefits, effective April 11, 2010, on the basis that he refused suitable work. It advised him that Dr. Ferretti found the job suitable and his report represented the weight of the medical evidence.

Appellant requested a telephone hearing, which was held on August 4, 2010. He reiterated that he could physically perform the position offered, but he was unable to commute to and from the position in Fremont, CA. Appellant explained that it took approximately one to two hours each way to drive to the location and that public transportation would take anywhere from three to three and a half hours each way. After the hearing, OWCP received several medical reports. In an August 11, 2010 report, Dr. Thomas Keller, a Board-certified internist, working with Dr. Tran, noted that he treated appellant for failed back surgery syndrome with a history of 11 spinal operations persistent back pain, right sciatica and right sacroiliac arthropathy and early left sciatica. He prescribed several medications to include Darvocet, Percocet, Naprosyn, Neurontin and Lidoderm. OWCP also received a copy of an article pertaining to drivers on prescription drugs.

By decision dated October 25, 2010, OWCP's hearing representative affirmed the April 9, 2010 decision.

On April 22, 2011 counsel requested reconsideration. He argued that acceptance of the job offer would require a round-trip commute of 140 miles and that public transit would require three to three and a half hours each way. Counsel noted that appellant took narcotic pain medication since May 2008, which precluded him from operating a motor vehicle. He opined that the job offered was not suitable because it was not within reasonable commuting distance and driving was precluded by the use of prescribed narcotic medication.

In a March 24, 2011 report, Dr. Michael Yang, Board-certified in pain medicine, noted that appellant recently underwent surgery for lumbar radiculopathy on February 28, 2011; however, he continued to have mid thoracic pain. He diagnosed failed back surgery syndrome, persistent bilateral lumbar radiculopathy, trigger points in the trapezius and rhomboid muscles, myofascial pain/spasm and pain-induced insomnia. Dr Yang stated "we specifically request that [appellant] do not drive while using these medications."

By decision dated December 19, 2011, OWCP denied modification of the October 25, 2010 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim it has the burden of justifying termination or modification of compensation benefits.[4] This includes cases in which OWCP terminates compensation under section 8106(c) (2) of FECA for refusal to accept suitable work.

Section 8106(c)(2)[5] of FECA provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to compensation. Section 10.517(a)[6] of OWCP's regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured for him or her has the burden to show that this refusal or failure to work was reasonable or justified. After providing the two notices described in section 10.516,[7] OWCP will terminate the employee's entitlement to further compensation under 5 U.S.C. §§ 8105, 8106 and 8107, as provided by 5 U.S.C. § 8106(c)(2). However, the employee remains entitled to medical benefits as provided by 5 U.S.C. § 8103 or justified. To justify termination, it must show that the work offered was suitable[8] and must inform appellant of the consequences of refusal to accept such employment.[9]

OWCP's regulations provide that the employing establishment, if possible, should offer suitable reemployment in the location where the employee currently resides. If this is not practical, the employing establishment may offer suitable reemployment at the employee's former duty station or other location.[10] A preference for the area in which a claimant resides is not an acceptable reason for refusing an offered position.[11]

ANALYSIS

The employing establishment offered appellant a sedentary position as an administrative support specialist in Fremont, CA, which accommodated the work restrictions provided by Dr. Ferretti, the second opinion physician. OWCP reviewed the position and found it to be suitable. It terminated appellant's wage-loss compensation on the grounds that he refused the employing establishment's September 11, 2009 job offer. On appeal, counsel contends that the location of the offered position rendered it unsuitable as it was located approximately 140 miles away from appellant's home in Petaluma, CA. He also argued that OWCP failed to consider the

[4] *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

[5] 5 U.S.C. § 8106(c)(2).

[6] 20 C.F.R. § 10.517(a).

[7] *Id*. at § 10.516.

[8] *See Carl W. Putzier*, 37 ECAB 691 (1986); *Herbert R. Oldham*, 35 ECAB 339 (1983).

[9] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(d)(1).

[10] 20 C.F.R. § 10.508; *Sharon L. Dean*, 56 ECAB 175 (2004).

[11] *E.H.*, Docket No. 08-1862 (issued July 8, 2009).

impact of appellant's medication on his ability to drive or commute. Counsel noted that Dr. Harf advised that appellant should not drive more than a half hour at a time.

The Board notes that, in response to OWCP's notice that appellant's reasons for refusing the offered job were insufficient, he provided evidence that the commuting distance by public transportation to and from his home in Petaluma to Fremont, CA, would require him to travel over three hours each way and change bus lines several times. Appellant also submitted medical evidence concurring the medications he was prescribed for back pain and a November 20, 2009 report from Dr. Harf, who explained that appellant could drive no more than one half-hour at a time. Dr. Harf indicated that the commute to Fremont, CA, using either the freeway or public transportation, would not be feasible based on appellant's back condition.

The Board finds that OWCP did not make any attempt to determine whether suitable employment was possible in or around Petaluma, CA, where appellant resided at the time of the job offer, which is approximately 70 miles from the location of the offered position in Fremont, CA. OWCP should have developed this aspect of the case before finding the offer suitable. Its regulations state that the employing establishment should offer suitable reemployment where the employee currently resides, if possible.[12] The Board held in *Sharon L. Dean*,[13] that it is reversible error for OWCP to terminate appellant's compensation benefits without positive evidence showing that such an offer was not possible or practical. The August 14, 2009 conference reflects that appellant applied for jobs with the employing establishment closer to his residence. Ms. Purcell of the employing establishment indicated that there was no time frame as to when a decision would be made on the job applications and that he "must still interview for the jobs." OWCP indicated that it could not wait for the hiring process for these jobs. Although Ms. Purcell stated that appellant's former job at the Fremont airport might be available, appellant was "disqualified" from the job due to the medications he was taking.

The Board notes that Dr. Ferretti's May 11, 2009 report changed his January 20, 2009 opinion which advised against commuting or driving over one-half an hour at a time. Dr. Ferretti opined that appellant was able to drive or commute by public transportation. He explained, that to solve any low back pain, he could get up every half hour for 5 to 10 minutes and then sit during the remainder of his commute while driving or using public transportation. The Board notes that Dr. Harf reviewed Dr. Ferretti's report and explained that appellant could not drive for more than a half hour at a time. OWCP gave little consideration to Dr. Harf's recommendation that appellant drive no more that 30 minutes at a time and that commuting by public transportation for over three hours each way was not feasible. Furthermore, Dr. Ferretti did not adequately explain how he arrived at his conclusion in view of appellant's numerous prescribed medications, which precluded him from tower positions. As such, his opinion is equivocal and of diminished probative value.[14] Dr. Ferretti's report does not adequately address the impact of

[12] *Supra* note 10.

[13] *Sharon L. Dean, id. Cf. T.T.*, 58 ECAB 296 (2007) (where the Board found that OWCP met its burden of proof to terminate appellant's compensation benefits for refusing a suitable job offer on the basis that he did not relocate until after a suitable position was offered to her and her compensation benefits were terminated).

[14] *See Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962) (where the Board held that medical opinions based upon an incomplete history or which are speculative or equivocal in character have little probative value).

such medications on his ability to drive or commute. Because OWCP found that the administrative support specialist position in Fremont, CA, was suitable, without taking into sufficient consideration appellant's ability to drive or commute, it did not meet its burden of proof in terminating his compensation for refusing suitable work.

Under the circumstances of this case, OWCP did not properly find that appellant refused suitable work. The Board will reverse the December 19, 2011 decision.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation effective April 11, 2010, on the grounds that he refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the December 19, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 9, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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