United States Department of Labor
Employees' Compensation Appeals Board

H.L., Appellant	)	
and	)	**Docket No. 14-1926**
	)	**Issued: July 9, 2015**
U.S. POSTAL SERVICE, POST OFFICE, Columbus, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 2, 2014 appellant, through counsel, filed a timely appeal of a July 29, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 met its burden of proof to terminate appellant's compensation benefits effective November 6, 2013 pursuant to 5 U.S.C. § 8106(c).

FACTUAL HISTORY

On October 15, 2011 appellant, then a 42-year-old mail processing clerk, filed a traumatic injury claim alleging that on that date he sustained a back injury when he helped a

[1] 5 U.S.C. § 8101 *et seq.*

coworker prevent a pallet of mail from falling. He stopped work on that date. OWCP accepted the claim for a lumbar sprain and later expanded the claim to include a left shoulder sprain. Appellant's physician released appellant to limited-duty work on January 2, 2012. Appellant was provided limited-duty work for one hour a day beginning January 5, 2012.[2] He received appropriate compensation benefits.

In a January 10, 2012 report, Dr. Charles May, an osteopath and family practitioner, stated that appellant's work stoppage was due to worsening low back pain and radicular symptoms. Diagnostic testing revealed facet arthropathy but not radiculopathy. Dr. May noted that due to symptoms appellant had not been able to work as anticipated.

On February 6, 2012 OWCP referred appellant to Dr. Pietro Seni, a Board-certified orthopedic surgeon, for a second opinion. In a report dated March 21, 2012, Dr. Seni described appellant's history of injury and treatment and examined appellant. Appellant reported having back issues for a number of years with the worst injury occurring around 1991 while in military service. Dr. Seni determined that the accepted strain had resolved and there was no medical evidence to establish that appellant could not perform his regular duties. He further opined that any symptoms that appellant had been attributable to the preexisting back condition.

On April 12, 2012 OWCP forwarded the report to appellant's treating physician, Dr. May, for his review and comment. On April 16, 2012 Dr. May responded to its request. He explained that, while appellant's lumbar strain/sprain should have healed a long time ago, he did not believe that appellant could return to work without restrictions. Dr. May advised that appellant had evidence of facet arthropathy, which was the cause of his pain. He opined that he believed that facet arthropathy should be an accepted condition. Dr. May further indicated that appellant was unable to return to his usual duties as a result of the condition.

In an October 5, 2012 report, Dr. Sachidanandan P. Kanoor, Jr., a Board-certified internist, noted that appellant had chronic low back pain, a bulging disc, and multilevel degenerative arthritis. He indicated that appellant's condition was chronic and he could not lift, push, or pull any heavy weights.

OWCP found that Dr. Seni's report created a conflict with the opinion of the attending physician, Dr. May, with regard to whether the lumbar strain had resolved and appellant's resulting ability to work. On September 25, 2012 it referred appellant along with a statement of accepted facts, and the medical record to Dr. Ralph G. Rohner, a Board-certified orthopedic surgeon, for an impartial evaluation to resolve the conflict.

In a report dated October 9, 2012, Dr. Rohner noted appellant's history and treatment. He examined appellant and provided findings which included that his gait was nonantalgic and slow. Additionally, Dr. Rohner noted that, when appellant walked on his heels and toes, he

[2] Appellant also worked as a barber, for several hours a day in a nonfederal employment. The record reflects that he has a preexisting back condition. Other preexisting conditions included: chronic headaches; degenerative joint disease in the left acromioclavicular joint; tripartite patella; right partial meniscectomy and osteochondral defect of the femur; spondylosis with mild narrowing of the neuroforaminal at L4-5; and L5-S1 bilaterally with facet arthropathy.

complained of increased back pain. He found that appellant had lumbar flexion to 30 degrees and extension to 10 degrees. Lateral flexion to the right was 10 degrees and 30 degrees on the left. Appellant had paraspinal muscle tenderness and sacroiliac joint tenderness more right than left. There was no sciatic notch tenderness. In the sitting position, the popliteal compression tests were unremarkable, while the left knee extension test gave low back pain. The right knee extension test gave low back pain but actually to a lesser degree than the left. Appellant had complaints of decreased sensation involving the left lower extremity over the right involving both the L4-5 and L5-S1 nerve roots. Dr. Rohner explained that, while appellant could not return to regular duty, he could perform limited-duty work for eight hours a day. He advised that, if appellant could work five hours a day, three and four days a week as a barber, appellant could work in the employing establishment with proper restrictions for the same amount of time, with proper pain management. Dr. Rohner completed a work capacity evaluation. The restrictions included that appellant could intermittently sit and reach for no more than three hours a day and have no more than two hours of standing. Dr. Rohner prescribed a five-pound lifting restriction. He recommended that appellant commence limited duty at four hours a day and gradually increase. Dr. Rohner also indicated that more definition was needed with regard to some activities such as pushing and climbing.

On November 13, 2012 the employing establishment provided appellant with a modified job offer as a mail processing clerk. Appellant refused to sign the offer and asserted that it was not a valid job offer. He indicated that it was not a gradual return, the duties violated his restrictions, and also violated his prior restrictions for his knee injury under a separate claim.

In a December 19, 2012 report, Dr. May advised that, based upon appellant's injuries to his right knee and lumbar spine, he was unable to perform the flat preparation duty required by the offered position.

On December 19, 2012 OWCP advised the impartial medical examiner that appellant sustained a work-related knee injury under a separate claim and described his work limitations from that injury. It requested that he review the job offer and advise whether appellant could perform the physical requirements.

In a January 11, 2013 addendum, Dr. Rohner advised that for the right knee Dr. May noted restrictions to include a weight limit of 20 pounds. Sitting was one to six hours a day, standing one hour a day, walking one hour a day bending, stooping, twisting, pushing, and pulling were one hour a day. In a January 15, 2013 addendum, Dr. Rohner noted reviewing the modified-job assignment dated November 13, 2012. He reviewed the work restrictions for the back and those provided by Dr. May for the knee. Dr. Rohner indicated that intermittent standing for three hours was acceptable as was the five-pound weight lifting. He indicated that appellant could not carry for four hours without exceeding the two-hour intermittent walking, two-hour and one-hour intermittent walking restrictions.

In a letter dated March 4, 2013, Annette Clark, a health and human resource management specialist with the employing establishment, indicated that the job offer mirrored Dr. Rohner's restrictions. However, it was for only three hours a day and not four hours. Ms. Clark also noted that appellant owned a barber shop and cut hair while standing on a daily basis. She indicated

that her observations revealed that he was not adhering to these limitations off the job while performing his business duties.

In a letter dated June 25, 2013, the employing establishment notified appellant that it was providing him with a limited-duty job offer working three hours a day, five days a week based upon his medical restrictions. Appellant was advised that the position was a lobby director position where he would be assisting window clerks by helping customers in line. On August 5, 2013 the lobby direction job offer was presented to appellant. The job entailed intermittent standing and walking for up to two hours a day, stocking inventory not weighing over five pounds, and intermittent sitting for up to three hours a day. Total work hours were four hours a day, five days a week.

In a letter dated August 6, 2013, appellant refused the offer. He explained that the 25-mile drive would aggravate his condition. Appellant further noted that the lobby did not have seating and the shelves were high and there would be reaching, all of which violated his restrictions and were outside his work limitations.

In a letter dated August 26, 2013, the employing establishment requested that OWCP provide a suitability determination on the job offer.

In a September 9, 2013 report, Dr. May examined appellant and indicated that his pain was work related.

On September 12, 2013 OWCP advised appellant that it had confirmed with the employing establishment that the position remained available. It explained that the lobby director position was suitable and in accordance with his medical conditions and that he had 30 days to accept the position. OWCP also informed appellant that the 25-mile drive was not a valid reason to refuse the position as the physicians had not restricted driving. It also advised him that, if he failed to report to the offered position and failed to demonstrate that the failure was justified, his right to compensation would be terminated.

On September 18, 2013 appellant repeated his reasons for refusing the offer, reiterating his concern that the job would make his condition worse. They included that the driving distance of 25 miles and the lobby facilities and layout would aggravate his conditions. Appellant also indicated that there was no seating.

In an October 21, 2013 telephone call memorandum, OWCP contacted the employing establishment to confirm whether the job offer remained available and addressed the concerns of appellant. The employing establishment indicated that appellant would be able to "sit in the back" intermittently but "not in the lobby because it is not professional." Additionally, it indicated that stocking the shelves did not entail bending and lifting as the shelves were waist high.

In an October 21, 2013 letter, OWCP advised appellant that his reasons for refusing the offered position were insufficient. It confirmed that the job offer remained available and that he would be able to sit as needed. OWCP afforded appellant 15 days in which to accept the position without penalty, noting that no further reasons for refusal would be considered. If appellant still refused the offered position, he would face termination of his monetary benefits.

In a November 6, 2013 decision, OWCP terminated appellant's wage-loss and schedule award benefits finding that he had failed to accept suitable work after work was offered to him. It found that his reasons for refusing the job offer were unacceptable.

In a February 10, 2014 report, Dr. May noted that appellant had two work injuries while working for the employing establishment. He indicated that aside from the present claim, appellant also had a right knee injury that resulted in osteoarthritis of the right knee under File No. xxxxxx044 that affected his ability to stand, walk, climb, or crawl. Dr. May explained that he read the work modifications for the lobby director position. He agreed that the modified assignments were within appellant's work ability. However, Dr. May was concerned about appellant sitting three hours a day and walking intermittently two hours a day. He explained that the job offer indicated that there was no sitting allowed in the lobby as it was unprofessional. Dr. May noted that it indicated that there was seating in a back room which could be utilized intermittently for three hours a day per appellant's restrictions. He opined that the job offer exceeded appellant's restrictions as he would not be able to sit and/or stand as necessary or as needed or change position as needed and he would have to walk to a back room in order to sit. Dr. May explained that this would affect not only appellant's low back injury, but also his knee injury. He recommended declining the job offer unless appellant had the ability to sit or stand on an as needed basis within a very reasonable distance *i.e.*, within the lobby of his workstation.

On November 14, 2013 counsel requested a hearing, which was held on May 8, 2014. He argued that appellant's physician indicated that the job was not suitable as appellant would not be able to sit or stand as necessary. Appellant also indicated that, while he did not get to see the room where he could actually sit, he indicated that the lobby was huge and he did not believe that he would be able to physically walk back and forth to the back room to sit outside the lobby area on an intermittent basis. Counsel indicated that appellant also refused the job offer based upon his physician's recommendation and noted Dr. May's February 10, 2014, report.

By decision dated July 29, 2014, an OWCP hearing representative affirmed the November 6, 2013 decision.

LEGAL PRECEDENT

Section 8106(c)(2)[3] 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. 5 U.S.C. § 8106(c) 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." It is OWCP's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[4] To justify such a termination, OWCP must show that the work offered was suitable.[5] An employee who refuses or

[3] 5 U.S.C. § 8106(c).

[4] *Henry P. Gilmore*, 46 ECAB 709 (1995).

[5] *John E. Lemker*, 45 ECAB 258 (1993).

neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[6]

Section 8123(a) 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.[7] In situations where the case is referred to an impartial medical specialist for the purpose of resolving a medical conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[8]

ANALYSIS

OWCP terminated appellant's benefits under 5 U.S.C. § 8106(c) finding that the offered position was medically suitable as it was within the medical restrictions of record.

OWCP accepted that appellant sustained a lumbar sprain and a left shoulder sprain. It found that Dr. Seni's report created a conflict with the opinion of appellant's physician, Dr. May, with regard to whether the lumbar strain had resolved and appellant's resulting ability to work. Therefore, OWCP properly referred appellant to Dr. Rohner, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict in the role of referee.

In a report dated October 9, 2012, Dr. Rohner noted appellant's history and treatment, examined him, and provided findings. He explained that, while appellant could not return to regular duty he could perform limited-duty work for eight hours a day. Dr. Rohner explained that, if appellant could work five hours a day, three and four days a week as a barber, he could work in the employing establishment with proper restrictions for the same amount of time, with proper pain management. He completed a work capacity evaluation and advised that appellant could intermittently sit and reach for no more than three hours a day, and have no more than two hours of standing with lifting of no more than five pounds. Dr. Rohner recommended that appellant begin limited-duty work at four hours a day and gradually increase. Furthermore, more definition was needed with regard to some activities such as pushing and climbing.

Appellant asserted that Dr. Rohner's restrictions violated his prior restrictions for his knee injury under a separate claim. Dr. May provided a December 19, 2012 report, advising that appellant was unable to perform the flat preparation duty required in the position based upon appellant's injuries to his right knee and lumbar spine.

On December 19, 2012 OWCP advised Dr. Rohner that appellant sustained a work-related knee injury under a separate claim and described his work limitations from that injury. It requested that he review the job offer and advise whether appellant could perform the physical

[6] *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.517(a).

[7] 5 U.S.C. § 8123(a).

[8] *Guiseppe Aversa*, 55 ECAB 164 (2003).

requirements.[9] In a January 15, 2013 addendum, Dr. Rohner indicated that he had reviewed a copy of a modified-job assignment dated November 13, 2012. He reviewed the work restrictions for the back and those provided by Dr. May for the knee. Dr. Rohner determined that intermittent standing for three hours was acceptable as was the five-pound weight lifting. He indicated that appellant could not carry for four hours without exceeding the two-hour intermittent walking, two-hour and one-hour intermittent walking restrictions. In a letter dated March 4, 2013, Ms. Clark with the employing establishment confirmed that the job offer mirrored Dr. Rohner's restrictions and noted that the job only required three hours a day and not four hours.

The Board finds that Dr. Rohner's opinion is entitled to special weight as his report is sufficiently well rationalized and based upon a proper factual background. OWCP properly relied upon Dr. Rohner's reports in finding that the work offered to appellant was suitable. Dr. Rohner examined appellant, reviewed his medical records, and reported an accurate history. The Board finds that OWCP met its burden of proof to terminate wage-loss and schedule award benefits as appellant refused suitable work. Although appellant noted objections to the job offer, and argued there was no seating in the lobby where he would be working, Dr. Rohner reviewed the job offer and confirmed that appellant was capable of performing the duties. The employing establishment also explained that, while he could not sit in the front lobby, he was able to sit in the back.

Subsequent to terminating appellant's benefits, OWCP received a February 10, 2014 report from Dr. May, who advised that appellant could not perform the modified-duty positon as he would have to walk into the back room to sit instead of being able to sit in the lobby. However, it confirmed with the employing establishment that appellant would be able to sit as needed. Furthermore, Dr. May was on one side of the conflict in the medical opinion that Dr. Rohner resolved, and his report is insufficient to overcome the special weight accorded the impartial specialist or to create a new medical conflict.[10]

The Board finds that Dr. Rohner's report established that appellant was capable of performing the job offered and the position was suitable, and thereby OWCP was justified in its July 29, 2014 termination of benefits as he refused suitable work.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

[9] *See id.* (where OWCP secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, OWCP has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original opinion).

[10] *Alice J. Tysinger*, 51 ECAB 638 (2000); *Barbara J. Warren*, 51 ECAB 413 (2000).

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's compensation benefits effective November 6, 2013 pursuant to 5 U.S.C. § 8106(c).

ORDER

IT IS HEREBY ORDERED THAT the July 29, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 9, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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