

U.S. Department of Labor Employees' Compensation Appeals Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210



DATE: November 28, 2012

REPLY TO
ATTN. OF: Employees' Compensation Appeals Board

SUBJECT: Board's Action and Case Record

Name:

File No.:

Docket No.:

TO: Director
Office of Workers' Compensation Programs

Transmitted herewith is a copy of the Board's Action entered today in the above case, and your file consisting of 0 numbered pages.

By direction of the Board,

Thomas O. Shepherd, Jr., Esq.
Clerk of the Appellate Boards

Attachment(s)

DEC - 3 2012

RECEIVED: _____
Office of Workers' Compensation Programs

BY: _____

**United States Department of Labor
Employees' Compensation Appeals Board**

E.G., Appellant)	
)	
and)	Docket No.
)	Issued: November 28, 2012
)	
, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 12, 2012 appellant filed a timely appeal from an October 14, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this case.

ISSUE

The issue is whether OWCP properly terminated appellant's compensation effective April 14, 2008 on the grounds that he refused an offer of suitable work.

FACTUAL HISTORY

This case has previously been before the Board. In an August 9, 2011 decision, the Board set aside a May 25, 2010 decision affirming OWCP's December 23, 2008 decision

¹ 5 U.S.C. § 8101 *et seq.*

terminating appellant's compensation benefits for refusal to accept suitable employment.² The facts and law contained in that decision are incorporated herein by reference. The relevant facts are delineated below.

On _____, appellant, a _____-year-old _____, filed an occupational disease claim alleging that he sustained injuries to his cervical spine and upper extremities as a result of employment activities. OWCP accepted his claim for aggravation of degeneration of thoracic intervertebral disc and aggravation of degenerative disc disease at C4-5.³

OWCP found a conflict in medical opinion between appellant's treating physician, Dr. _____, a Board-certified orthopedic surgeon, who opined that appellant was totally disabled and a second opinion physician, Dr. _____, a Board-certified orthopedic surgeon, who opined that appellant's accepted conditions had resolved and that he was able to return to regular duties. Appellant was referred to Dr. _____, a Board-certified orthopedic surgeon, in order to resolve the conflict.

In a November 15, 2007 report, Dr. _____ diagnosed degenerative disc disease at C4-5, which he opined was continually aggravated by driving a postal vehicle and retrieving mail. He noted that appellant had been primarily under the care of Dr. _____ and had various work-ups and tests performed at his recommendation. A prior x-ray of the cervical spine showed degenerative disc disease at the C4-5 level. An earlier magnetic resonance imaging scan of the cervical spine showed C4-5 degenerative disc disease with large central disc osteophyte complex with moderate central canal stenosis, a T7 disc herniation with resultant mild cord compression and a T1 disc herniation with mild canal compression. Previous studies of the lumbar spine showed degenerative disc disease, which Dr. _____ noted had been accepted by OWCP and was a "chronic problem."

Objective findings on examination included restricted range of motion in the cervical spine, hyperactive reflexes and nonsustained clonus in the lower extremities. Dr. _____ opined that appellant's condition was permanent and "possibly could be progressive." He stated that appellant's lumbar pain was due to chronic degenerative disc disease in his back. Dr. _____ opined that appellant was capable of sedentary work only and recommended that he be restricted from working more than six hours per day, from reaching above the shoulder and from lifting more than 10 pounds.

On February 7, 2008 the employing establishment offered appellant a four-hour-a-day modified rural carrier position, which it characterized as "sedentary clerical work." Duties included: (1) processing "kill mail;" (2) answering telephones (taking messages and paging appropriate employees; and (3) serving as lobby director (assisting and directing customers).

² Docket No. 11-295 (issued August 9, 2011).

³ A review of FECS indicates that appellant's _____ traumatic injury claim was accepted for chronic lumbar strain (File No. _____). Appellant's _____ traumatic injury claim was accepted for sprains of the neck and lumbar spine (File No. _____). His _____ claim for neck and back injuries was denied (File No. _____). Appellant's _____ emotional disease claim was also denied (File No. _____).

On February 21, 2008 OWCP notified appellant that it found the February 7, 2008 job offer to be suitable and in accordance with Dr. [redacted] restrictions. It gave him 30 days to accept the position or provide an acceptable reason for rejecting it. On February 25, 2008 appellant informed OWCP that he was unable to perform the duties of the offered position due to his lower back and neck condition. On March 26, 2008 OWCP advised him that his reasons for refusing the position were unacceptable and provided him 15 days to accept the position.

Appellant submitted a report dated April 9, 2008 from Dr. [redacted], a Board-certified psychiatrist, who had treated appellant for depression. Dr. [redacted] opined that appellant would be unable to return to work due to his history of depression and chronic pain.

By decision dated April 14, 2008, OWCP terminated appellant's compensation benefits based on his refusal to accept suitable employment.

On April 20, 2008 appellant requested an oral hearing.

In a decision dated December 23, 2008, an OWCP hearing representative affirmed the April 14, 2008 decision finding that the physical requirements of the offered position conformed to Dr. [redacted] restrictions, which represented the weight of the medical evidence.

On December 22, 2009 appellant requested reconsideration, contending that OWCP failed to consider the entirety of his physical conditions, both work related and nonwork related, as required. He submitted a June 4, 2009 report from Dr. [redacted], who stated that he had treated appellant on a regular basis since [redacted] when he was diagnosed with major depressive episode severe, dysthymia and alcohol dependency. Dr. [redacted] noted that, as of April 9, 2008, appellant was taking medications (including prozac, klonopin and lyrica) capable of causing dizziness, abnormal coordination, emotional lability, confusion, nervousness, anxiety, weakness and problems concentrating. Noting that he had reviewed the position offered to appellant on February 7, 2008, he opined that appellant was not able to return to work on April 9, 2008 and was not able to be physically present to perform those tasks. As of March 31, 2008 appellant was having periods of uncontrollable crying, was experiencing sleep disturbance on a regular basis and when even driving near any postal facility, reported severe anxiety, which was manifested by difficulty breathing, shaking and feelings of impending doom. When he attempted unsuccessfully to return to work in 2007, he reported ongoing anxiety in interacting with others. Dr. [redacted] opined that appellant's inability to interact with others would preclude his ability to perform the duties of the offered position.⁴

By decision dated May 25, 2010, OWCP denied appellant's request for reconsideration. In a decision dated August 9, 2011, the Board set aside the May 25, 2010 decision and remanded the case for further merit review.⁵

By decision dated October 14, 2011, OWCP denied modification of its April 14, 2008 decision.

⁴ OWCP is required to consider preexisting and subsequently acquired conditions in evaluating the suitability of an offered position. See *Richard P. Cortes*, 56 ECAB 200 (2004).

⁵ Docket No [redacted] (issued August 9, 2011)

LEGAL PRECEDENT

FECA provides at section 8106(c)(2) that a partially disabled employee who refuses or neglects to work after suitable work is offered is not entitled to compensation.⁶ Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits under section 8106 for refusing to accept or neglecting to perform suitable work.⁷ The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to future wage-loss compensation and, for this reason, will be narrowly construed.⁸

To establish that a claimant has abandoned suitable work, OWCP must substantiate that the position offered was consistent with the claimant's physical limitations and that the reasons offered for stopping work were unjustified.⁹ The issue of whether a claimant has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence of record.¹⁰

Section 10.516 of the implementing federal regulations states that OWCP will advise the employee that the work offered is suitable and provides 30 days for the employee to accept the job or present any reasons to counter its finding of suitability.¹¹ Before terminating compensation, it must review the employee's proffered reasons for refusing or neglecting to work.¹² If the employee presents such reasons and OWCP finds them unreasonable it will offer the employee an additional 15 days to accept the job without penalty. The Board has held that, in cases where compensation is terminated pursuant to section 8106(c), the essential requirements of due process, notice and an opportunity to respond apply not only where an employee refuses suitable work, but also apply in the same force to cases where an employee abandons suitable work.¹³

OWCP is required to send certain information to a physician who is selected to perform a referee medical examination, including:

“(1) *Description of the reason(s) for requesting the examination, including an indication of the conflict and a list of questions to be resolved, along with a blank Form OWCP-5 if appropriate.*

⁶ 5 U.S.C. § 8106(c)(2).

⁷ See *Bryan F. Blackmon*, 56 ECAB 752 (2005); *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

⁸ See *Richard P. Cortes*, *supra* note 4, *H. Adrian Osborne*, 48 ECAB 556 (1997).

⁹ See *Wayne E. Boyd*, 49 ECAB 202 (1997).

¹⁰ See *John E. Lemker*, 45 ECAB 258 (1993); *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

¹¹ 20 C.F.R. § 10.516.

¹² See *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

¹³ *Mary A. Howard*, 45 ECAB 646 (1994).

“(2) *Statement of Accepted Facts (SOAF)*.

“(3) *Copy of the complete case file*, either in paper or electronic form.

“(4) *Notice that he or she is the only individual* authorized to perform the requested examination and provide the required report.

“(5) *Prompt payment billing information*, including the code for referee medical examination or case review.”¹⁴

OWCP’s procedures provide that the referee physician should provide a report which contains a clinical history, results of the examination, results of any testing performed and a reasoned opinion in response to the questions posed sufficient to resolve the conflict. The procedures further require the referee physician to use the SOAF as the framework for his or her opinion.¹⁵

ANALYSIS

The Board finds that OWCP failed to meet its burden of proof to terminate appellant’s wage-loss compensation based on the finding that he refused an offer of suitable work.

In developing the medical evidence, OWCP determined that a conflict in medical opinion arose regarding appellant’s capacity for work. It properly referred him to Dr. [redacted] for an impartial medical examination. Dr. [redacted] report, however, was insufficient to resolve the conflict. Therefore, OWCP improperly relied on his opinion when determining that the position offered by the employing establishment constituted suitable employment.

OWCP’s procedures provide that the referee physician should provide a report which contains a clinical history, results of the examination, results of any testing performed and a reasoned opinion in response to the questions posed sufficient to resolve the conflict. The procedures further require the referee physician to use the SOAF as the framework for his or her opinion.¹⁶ Dr. [redacted] November 15, 2007 report was deficient on several counts. The report did not include a detailed clinical history or detailed findings on examination such as range of motion measurements. There is no evidence that Dr. [redacted] performed any specific tests to support his conclusions. He did not indicate that he had reviewed or used OWCP’s SOAF as a basis for his opinion, as required. The record does not establish that Dr. [redacted] received a SOAF from OWCP. Dr. [redacted] diagnosed degenerative cervical and lumbar disc disease, opined that appellant was capable of sedentary work only and recommended that he be restricted from working more than six hours per day, from reaching above the shoulder and from lifting more than 10 pounds. He did not, however, explain whether his restrictions were based only on appellant’s accepted condition in the instant case, as opposed to his accepted lumbar condition in

¹⁴ Federal (FECA) Procedure Manual, Part 3 -- Medical Examinations, *Referee Examinations*, Chapter 3.500.4(c) (July 2011).

¹⁵ *Id.* at Chapter 3.500.4(g)

¹⁶ *Id.*

