U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS R. POLEFKO and U.S. POSTAL SERVICE,
POST OFFICE, Kent, Ohio

Docket No. 95-2849; Submitted on the Record;
Issued February 4, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the grounds that he had refused an offer of suitable work.

In the present case, the Office accepted that appellant sustained a bilateral shoulder impingement causally related to factors of his federal employment. Appellant stopped working in April 1987 and received appropriate compensation benefits. By decision dated July 12, 1995, the Office terminated appellant's compensation effective July 23, 1995 on the grounds that he had refused an offer of suitable work. In a decision dated August 17, 1995, the Office denied appellant's request for reconsideration without review of the merits of the claim.

The Board has reviewed the record and finds that the Office did not properly terminate appellant's compensation.

Section 8106(c)(2) of the Federal Employees' Compensation 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."[1] However, to justify such termination, the Office must show that the work offered was suitable.[2] An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[3]

As noted above, it is the Office's burden to establish that the position offered by the employing establishment was suitable. In this case, the Office based its determination of medical suitability on the reports from Dr. Charles J. Paquelet, a Board-certified orthopedic

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[1] 5 U.S.C. § 8106(c)(2).

[2] *David P. Camacho,* 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 41 ECAB 375, 385 (1990).

[3] *Carl N. Curts,* 45 ECAB 374 (1994); 20 C.F.R. § 10.124(c).

surgeon serving as a second opinion referral physician. In a report dated April 10, 1995, Dr. Paquelet provided a history and results on examination. Dr. Paquelet stated that appellant had work restrictions from the accepted employment injury and he "would agree to" the rehabilitation job offer of July 26, 1994, noting that the job offer had no lifting over two pounds with no bending, squatting, climbing, kneeling or twisting.[4]

It is well established that in assessing the suitability of a position, the Office must also consider preexisting conditions,[5] as well as conditions arising after the compensable injury, even if not work related.[6] In this case, Dr. Paquelet completed a work restriction evaluation (Form OWCP-5c) stating that appellant had carpal tunnel syndrome of both hands that would "interfere" with the job offer, as well as chronic low back pain that would also interfere with the job offer. Dr. Paquelet also stated in his narrative report that appellant had a "variety of potentially disabling conditions," including chronic low back pain, bilateral carpal tunnel syndrome and hemochromatosis. It is not clear whether Dr. Paquelet felt that appellant had other conditions that would prohibit him from performing the light-duty position offered. The questions for resolution provided by the Office to Dr. Paquelet did not request a discussion of nonwork-related conditions, and Dr. Paquelet appears to limit his discussion of appellant's specific work restrictions to those resulting from his accepted employment injury. The Office should have requested a supplemental report from Dr. Paquelet clarifying the nature and extent of the "interference" from the other medical conditions noted by Dr. Paquelet. The medical evidence of record is not sufficient to establish that the offered position was medically suitable in this case. It is the Office's burden of proof to establish suitability, and the Board finds that they have not met their burden of proof in the instant case.

[4] The Board notes that the job offer of July 26, 1994 was for a modified letter carrier. The actual job offer at issue in this case is a modified general clerk position offer dated May 26, 1995, which is similar to the earlier position but also restricts working at chest level or above.

[5] *See* 20 C.F.R. § 10.124(c).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (December 1993) ("If medical reports in file document a condition which has arisen since the compensable injury, and this condition disables the claimant from the offered job, the job will be considered unsuitable (even if the subsequently acquired condition is not work related).")

The decisions of the Office of Workers' Compensation Programs dated August 17 and July 12, 1995 are reversed.

Dated, Washington, D.C.
February 4, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member