

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

FREDDY NOBLECILLA, Appellant

and

**U.S. POSTAL SERVICE,
POST OFFICE, White Plains, NY, Employer**

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**Docket No. 03-2190
Issued: February 5, 2004**

Appearances:
Thomas S. Harkins, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On September 3, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated June 12, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation on the grounds that he refused an offer of suitable work.¹

¹ Appellant's representative also argues that appellant is entitled a schedule award due to permanent impairment of the left upper extremity. However, the Board notes that it is well established that, once compensation is terminated pursuant to section 8106(c)(2), it is a bar to receipt of compensation for a schedule award after the date of termination. The penalty provision of section 8106(c)(2) serves as a bar to claimant's entitlement to further compensation for total disability, partial disability or a schedule award for permanent impairment arising out of an accepted employment injury. See *Albert Pineiro*, 51 ECAB 310, 313 (2000); *Stephen R. Lubin*, 43 ECAB 564 (1992).

FACTUAL HISTORY

On August 2, 2001 appellant, then a 30-year-old mail handler, filed a notice of traumatic injury alleging that he injured his left wrist on July 31, 2001 when a heavy box of mail slipped out of his hands. The Office accepted the claim for left wrist tendinitis. The Office also approved arthroscopic surgery to repair a fibro cartilage tear, which was performed on May 10, 2002 by Dr. John Mitamura, a Board-certified orthopedic surgeon. Dr. Mitamura referred appellant to Dr. Gerald F. Gaughan, a Board-certified physiatrist, for physical therapy. Appellant stopped work on July 31, 2001 and has since received disability compensation on the periodic rolls.

The Office referred appellant for a second opinion evaluation with Dr. John S. Mazella, a Board-certified orthopedic surgeon, on July 16, 2002. Dr. Mazella discussed appellant's history of injury and his symptoms of left wrist pain. Physical findings were also noted with respect to range of motion and grip strength. He opined that appellant could return to full-time duty in four weeks' time, working eight hours per day so long as he did not engage in repetitive activities of the left hand or wrist. Dr. Mazella also assigned a 10-pound lifting restriction.

In an August 19, 2002 letter, the Office sent a copy of Dr. Mazella's report to Dr. Mitamura and asked him to provide his opinion as to whether appellant could return to work. In the interim, the employing establishment sent a job offer to appellant on August 30, 2002 for a limited-duty position as a modified mail handler. The duties stated that appellant would work in the 010 culling area. He was required to stand and place incoming mail face up, repair damaged mail with tape and hand cancel mail pieces with his right hand only. There was to be no repetitive movement of the left wrist and no lifting, pushing or pulling over 10 pounds in accordance with the work restrictions listed by Dr. Mazella.

In reports dated September 3 and 10, 2002, Dr. Mitamura noted that appellant was "status post left wrist arthroscopy" with diminished left wrist pain. He recommended that appellant wear a supportive wrist splint and that he undergo a cortisone injection. However, Dr. Mitamura did not address appellant's capacity for work.

On September 24, 2002 the Office advised appellant that the job offered to appellant was deemed to be suitable work. Appellant was informed that he had 30 days to accept the job offer or provide a reasonable explanation for refusing the offer or else he risked termination of his compensation. Appellant subsequently submitted a report from Dr. Mitamura dated September 19, 2002, which basically reiterated earlier reports by Dr. Mitamura explaining that appellant was still undergoing treatment for left wrist pain including physical therapy and cortisone injections. In a letter dated November 5, 2002, the Office advised appellant that the additional evidence was insufficient to change its determination that the job offer constituted suitable work. Appellant was told that he had an additional 15 days to accept the job offer or his compensation would be terminated.

In a decision dated November 25, 2002, the Office terminated appellant's wage-loss compensation effective December 1, 2002, on the grounds that he refused an offer of suitable

work.² On April 15, 2003 appellant through counsel filed a request for reconsideration, alleging that the position offered was not suitable since it would require appellant to perform repetitive activities with his left wrist and hand in violation of his medical restrictions. Appellant also requested that the Office consider his entitlement to a schedule award.

In support of his reconsideration request, appellant submitted reports from Dr. Gaughan dated January 10, 2003 and Dr. Mitamura dated March 11, 2003. Dr. Gaughan reported that appellant was unable to perform the limited-duty job at the time his compensation was terminated because he was unable to tolerate repetitive activities involving the left wrist and hand. Dr. Gaughan related appellant's description of the work duties associated with the limited job offer, noting that "facing mail upright" would require the use of appellant's left hand, while mail canceling required use of a right hand stamp. He noted that appellant would have to use both hands to fix dog-eared mail. He further described that appellant was required to push a heavy bin with both hands in the limited-duty position. Dr. Gaughan also calculated that appellant had 35 percent impairment of the left hand based on state workers' compensation guidelines. He did not address the degree of appellant's permanent impairment of the left upper extremity in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

In his March 11, 2003 report, Dr. Mitamura opined that appellant could not perform his previous occupation nor the work described by the limited-duty assignment detail sheet. He noted as follows: "[appellant] has continued weakness in strength at the left hand and believes that any job he will [perform] will incorporate use of the left hand. This job as well as all other jobs have risk with a possibility of further health impairment.

In a decision dated June 12, 2003, the Office denied modification of its prior decision. The Office determined that there was no evidence of record from which to conclude that appellant was unable to perform the limited-duty job offered to him and, therefore, that his compensation benefits were properly terminated. The Office further noted that in order to obtain a schedule award appellant would have to file a Form CA-7 claim along with a supplemental medical opinion from Dr. Gaughan addressing when his medical condition reached maximum medical improvement.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.³ The Office has authority under section 8106(c)(2) of the Federal Employees' Compensation Act to terminate compensation for any partially disabled employee, who refuses or neglects to work after suitable work is offered.⁴ To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the

² Appellant was advised that his medical benefits would continue.

³ *Roberto Rodriquez*, 50 ECAB 124 (1998).

⁴ 5 U.S.C. § 8106(c).

consequences of his or her refusal to accept such employment.⁵ Once the Office has demonstrated that the job offered is suitable the burden shifts to the employee to show that his or her refusal or failure to work is reasonable or justified.⁶

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.⁷ In assessing medical evidence, the number of physicians supporting one position over another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of, physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.⁸

ANALYSIS

The Board finds that the limited-duty job offered to appellant constituted suitable work based on the second opinion report from Dr. Mazella, who stated that appellant could work 8 hours per day with no repetitive use of the left hand or wrist and no lifting, pulling or pushing greater than 10 pounds. The Board notes that the description of job duties provided on the limited-duty work offer specifically stated that appellant was not required to use his left hand to perform the duties of a modified mail handler. Appellant was also not required to lift greater than 10 pounds as specified by Dr. Mazella. Because the limited-duty job offer is within the work restrictions provided by Dr. Mazella, the Office met its burden to establish that the position was suitable.

In the case of *Maggie L. Moore*, the Board held that, when the Office makes a preliminary determination of suitability and extends the employee a 30-day period either to accept or to give reasons for not accepting, the Office must consider any reasons given before it can make a final determination on the issue of suitability. Should the Office find the reasons unacceptable, it may finalize its preliminary determination of suitability, but it may not invoke the penalty provision of section 8106(c) without first affording the employee the opportunity to accept or refuse the offer of suitable work with notice of the penalty provision.⁹

Because appellant was offered a suitable job, he had the burden to demonstrate that his refusal to work was justified. FECA Bulletin No. 92-19, issued on July 31, 1992, adapted Office procedure to comply with the Board's ruling in *Moore*. The bulletin provides that, if the reasons given for refusal are considered unacceptable, the claimant will be informed of this by letter,

⁵ See *Ronald M. Jones*, 52 ECAB 190 (2000).

⁶ See 20 C.F.R. § 10.517; *Ronald M. Jones*, *supra* note 5.

⁷ *Maurissa Mack*, 50 ECAB 498 (1999); *Marilyn D. Polk*, 44 ECAB 673 (1993).

⁸ *Maurissa Mack*, *supra* note 7; *Connie Johns*, 44 ECAB 560 (1993).

⁹ *Maggie Moore* 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

given 15 days from the date of the letter to accept the job and advised that the Office will not consider any further reasons for refusal. If the employee does not accept the job within the 15-day period, compensation, including schedule award payments, will be terminated under section 8106(c).¹⁰

The Office followed these procedures and afforded appellant the protections set forth in Moore. The Office gave appellant a reasonable opportunity to accept the offer of employment, notified him of the penalty provision of section 8106(c) and properly considered his reasons for refusing the offered job. Although appellant submitted evidence from his treating physician to justify his refusal to work, that evidence only indicated that he was still receiving medical treatment for left wrist pain. Dr. Mitamura did not offer an opinion as to whether appellant was capable of performing the job offered to him. After reviewing this evidence, the Office notified appellant that his evidence was insufficient to change the suitability determination. The Office then extended appellant another 15 days to accept the job after his reasons for refusing it were deemed unreasonable. When he did not accept, the Office properly invoked the penalty provision of section 8106(c). Thus, the Board finds that the Office met its burden of proof in terminating appellant's compensation

Subsequent to the termination in conjunction with a reconsideration request, appellant once again raised the issue of whether or not the job offer was suitable. Appellant on reconsideration submitted reports from Dr. Gaughan and Dr. Mitamura, which find that he is unable to work in the limited-duty position deemed suitable by the Office. The Board notes, however, that these reports are not sufficiently reasoned to show that appellant's compensation was inappropriately terminated since neither physician accepts the description of the job duties provided by the employing establishment and accepted by the Office as suitable work. Instead, both Dr. Gaughan and Dr. Mitamura rely on appellant's own description of what he believes will be his job duties. Appellant has apparently told each physician that he will be required to use his left hand despite the job description provided by the employing establishment, which expressly stated to the contrary that appellant would not be required to use his left hand in the performance of his limited-duty work. Because neither Dr. Gaughan nor Dr. Mitamura had an accurate understanding of appellant's job requirements as provided by the limited-duty job description, the Board finds that their opinions to be insufficiently reasoned with respect to whether or not the limited-duty job was suitable for appellant. Consequently, the weight of the medical evidence residing with Dr. Mazella demonstrates that appellant could perform the limited-duty job offered to him and, therefore, the Office relying on Dr. Mazella's report properly terminated appellant's compensation for his failure to accept suitable work.

CONCLUSION

The Board finds that the Office properly terminated appellant's disability compensation effective December 1, 2002 because he refused an offer of suitable work.

¹⁰ See 20 C.F.R. § 10.516-517; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(d), 2.8145(d)(1) (July 1997).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 12, 2003 and November 25, 2002 are affirmed.

Issued: February 5, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member