United States Department of Labor
Employees' Compensation Appeals Board

DWAYNE A. BROWN, Appellant	)	
and	)	**Docket No. 04-54**
	)	**Issued: March 1, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Lancaster, PA, Employer	)	

Appearances:
Dwayne A. Brown, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On October 6, 2003 appellant filed a timely appeal of the February 14, 2003 decision of the Office of Workers' Compensation Programs, which affirmed the termination of appellant's compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this case.[1]

ISSUE

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

FACTUAL HISTORY

On July 21, 1995 appellant, then a 39-year-old mail handler, sustained a traumatic injury in the performance of duty. The Office accepted the claim for a herniated disc at C5-6.

[1] The Board does not have jurisdiction to review evidence that was not before the Office at the time it issued its final decision. 20 C.F.R. § 501.2(c).

Appellant underwent surgeries on August 17, 1995, November 11, 1999 and November 8, 2000 consisting of discectomy and fusion of the discs at C5-6 and C6-7. The Office paid appropriate wage-loss compensation following each surgical procedure. Appellant sustained a recurrence of disability on July 13, 2001 due to pain in his cervical spine from performing his work duties.[2] He has not returned to work since that date.

On November 20, 2001 the Office referred appellant to Dr. Perry Eagle, a Board-certified orthopedist, for a second opinion evaluation. In a report dated December 12, 2001, Dr. Eagle discussed appellant's history of injury, chief complaints and diagnostic tests consisting of various magnetic resonance images of the cervical spine. He noted that appellant's prognosis was guarded with respect to his back condition, but opined that appellant was able to return to work. On a work evaluation form dated December 12, 2001, Dr. Eagle stated that appellant could work eight hours per day with limitations of pushing, pulling and lifting and reaching above the shoulder of no more than 25 pounds for 2 hours per day.

In an attending physician's report and treatment note dated January 28, 2002, appellant's treating physician, Dr. Joseph P. Krzeminski, a Board-certified neurosurgeon, diagnosed continued cervical instability as a result of the July 21, 1995 work injury. He indicated that appellant remained totally disabled for work due to neck discomfort with activity. On January 20, 2002 the Office asked Dr. Krzeminski to review Dr. Eagle's opinion and address whether appellant could return to work under the restrictions he provided. The Office, however, did not receive a response from Dr. Krzeminski.

On February 5, 2002 the employing establishment issued a limited-duty job offer for the position of a modified mail handler. The job required appellant to face mail, repair torn mail, operate flyer and other canceling machines and duties consistent with the work restrictions provided by Dr. Eagle. In a letter dated February 14, 2002, the Office notified appellant that the offered position of modified mail handler constituted suitable work. Appellant was informed that he had 30 days to either accept the job offer or provide a reasonable explanation for refusing the suitable position. Additionally, the Office advised appellant that failure to accept suitable work could result in termination of his compensation. No response was received from appellant.

In a decision dated March 21, 2002, the Office terminated appellant's compensation on the grounds that he refused an offer of suitable work.

Appellant requested a hearing, which was held on November 25, 2002. Following the hearing additional evidence was submitted, including a copy of a decision from an administrative law judge awarding social security disability benefits, and disability certificates from Dr. Krzeminski dated September 5, 2000, December 11, 2001, January 28, March 19, May 15 and May 28, 2002. Dr. Krzeminski stated generally on each certificate that appellant should remain off work until further evaluation. On the May 15, 2002 work disability slip, the physician advised that appellant could return to work on May 20, 2002 with the restrictions that

[2] The Office initially developed appellant's claim for a recurrence of disability as an occupational disease claim. The case files were doubled under master file number A3-209800.

he be provided a chair with lumbar support and that he avoid bending, pushing, pulling and twisting. Appellant was instructed to begin working only six hours per day, increasing his time to eight hours a day after two weeks.

In a decision dated February 14, 2003, an Office hearing representative affirmed the Office's March 21, 2002 decision.

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 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]

ANALYSIS

By letter dated February 14, 2002, the Office informed appellant that it had reviewed the position description and found the job offer of a modified mail handler to be suitable with his work restrictions as stated by Dr. Eagle. The Board affirms the Office's suitability determination as Dr. Eagle examined appellant and provided a reasoned opinion, supported by the objective evidence, that appellant was capable of returning to work.

The Board finds that appellant was properly advised by the Office that he had 30 days to accept the suitable position or offer his reasons for refusing the job offer. He was apprised of the penalty provisions of section 8106(c), and notified that his compensation could be terminated if he refused an offer of suitable work. Appellant, however, did not respond to the Office's suitability letter. He did not provide any explanation why he rejected the job offer, nor did he indicate his acceptance of the offered position. Thus, the Office properly terminated appellant's compensation, finding that he refused an offer of suitable work.

The Board finds that the Office complied with its procedural requirements in advising appellant that the modified mail handler position was found suitable, and in providing appellant

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

[4] 5 U.S.C. § 8106(c).

[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).

the opportunity to give a reasonable explanation for his failure to return to work. The record reflects that appellant did not respond to the Office's notice. He failed to submit any evidence or argument to show that the offered position was not medically suitable.[8] In this case, because the medical evidence provided by Dr. Eagle established the suitability of the offered position, and the Office complied with the proper termination procedures, the Board finds that the Office met is burden of proof to terminate appellant's compensation based on appellant's refusal of suitable work. Thereafter, the burden shifted to appellant to establish that the refusal of the job offer was justified.[9]

The Board has carefully reviewed the evidence provided by appellant before the Office hearing representative and finds that Dr. Krzeminski's disability slips dated from December 2001 through March 2002 fail to provide reasoned medical rationale as to why appellant was unable to return to work under the medical restrictions provided by Dr. Eagle. Dr. Krzeminski has not addressed why appellant was unable to carry out the duties of the limited-duty job offer. Because the physician has not discussed any objective tests or physical findings to explain why appellant was justified in rejecting the suitable job offer, the Board finds the physician's opinion to be of little probative value.

The Board further notes that the administrative law judge's decision on appellant's social security benefits does not establish that appellant was unable to perform suitable work. The findings of other government agencies are not dispositive with regard to questions of disability arising under the Act. The administrative law judge's decision that appellant was disabled under the Social Security Act is not dispositive as to the issue of appellant's entitlement to federal workers' compensation and has no bearing on the outcome of this case.[10]

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation on the grounds that he refused an offer of suitable work.

[8] *See Gayle Harris*, 52 ECAB 319 (2001).

[9] *Id.*

[10] *Daniel Deparini*, 44 ECAB 657 (1993).

ORDER

IT IS HEREBY ORDERED THAT the February 14, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 1, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member