United States Department of Labor
Employees' Compensation Appeals Board

LAWRENCE WILSON, Appellant	)	
and	)	**Docket No. 04-1129**
	)	**Issued: January 24, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Atlanta, GA, Employer	)	

Appearances:
Ron Watson, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On March 23, 2004 appellant filed an appeal of a December 29, 2003 merit decision in which the Office of Workers' Compensation Programs denied modification of its previous decision which terminated his wage-loss compensation on the grounds that he refused an offer of suitable work and a February 12, 2004 nonmerit decision in which the Office denied merit review of appellant's request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the December 29, 2003 decision and over the Office's February 12, 2004 decision denying merit review.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's wage-loss compensation effective October 6, 2002 pursuant to 5 U.S.C. § 8106(c); and (2) whether the Office properly refused to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On March 9, 1991 appellant, then a 32-year-old mail carrier, filed a traumatic injury claim alleging that he was injured in the performance of his federal duties. Appellant stopped work that day. The Office accepted the claim for left shoulder strain, cervical disc herniation at C3-4, subluxation at C6-7 and right ulnar neuropathy and paid appropriate benefits.[1] On June 1, 1995 appellant returned to work as a modified clerk. By decision dated August 29, 1995, the Office determined that this position fairly and reasonably represented appellant's wage-earning capacity.[2]

Appellant continued to seek medical treatment from Dr. Joseph N. Saba, a Board-certified neurologist, who opined on May 7, 2001 that appellant was to continue working on permanent light duty. On May 15, 2002 appellant underwent a functional capacity evaluation which indicated that he was capable of a sedentary to light-duty position. It further advised that he could sit continuously; lift, carry, push and pull 1 to 5 pounds continuously and 10 pounds occasionally; continuously perform simple grasp and finger manipulation; frequently forward reach; and occasionally bend, squat/crouch, kneel, crawl, climb stairs, overhead reach and perform firm grasp..

On June 27, 2002 the employing establishment offered appellant an eight-hour per day modified city carrier position performing such duties as: answering telephones; filing paperwork; working the accountable cage by checking in/out carriers; driving to the employing establishment in the Atlanta area to lock up; working caller window services; working second notices on certified mail, parcels and express mail, etc; working nixie mail or return to sender mail; and performing other duties as assigned within physical restrictions. The physical requirements portion indicated that the job consisted of sedentary duties, with occasional standing and walking. Employee may sit, stand or walk to personal level of comfort. Limited lifting not to exceed 1 to 5 pounds constantly and 10 pounds frequently. Simple grasping and fine manipulation of the hands as needed in support of duties as assigned. Writing as needed in support of job duties and driving short distances within the Atlanta area. The physical restrictions portion indicated that the job consisted primarily of sedentary duties which would be performed from a sitting position with duties within arms reach of employee with occasional standing and walking. It reiterated that employee may sit, stand or walk to personal level of comfort. No lifting, pushing/pulling or carrying over 10 pounds frequently. May occasionally bend, squat, crouch, kneel, crawl and reach overhead and forward reach.

On July 3, 2002 Dr. Saba signed the June 27, 2002 job offer indicating that appellant was medically able to perform the offered job. As appellant failed to respond to the June 27, 2002 job offer, the employing establishment reoffered the position on July 3, 2002 and again on

[1] File No. 06-0512915 was assigned to this claim.

[2] The record indicates that, as a modified clerk, appellant sustained a neck injury on June 14, 1996 which the Office accepted for a cervical strain under file number 06-0661754. By decision dated March 3, 1998, the Office terminated appellant's compensation benefits on the basis that the weight of the medical evidence established that he had no continuing medical condition attributable to the work injury of June 14, 1996. In 1999, the Office doubled this file into appellant's original claim of March 9, 1991.

July 24, 2002. By letter dated July 26, 2002, the Office advised appellant that the position of modified city carrier was suitable and available. He was notified of the penalty provisions of section 8106 and given 30 days to respond.

In an August 7, 2002 report, Dr. Saba reported that he discussed the job offer with appellant and advised that he believed the job restrictions were fine so long as the restrictions were permanent. He additionally requested that appellant be allowed a 15-minute break for muscle stretching and position change every 45 minutes.

On August 12, 2002 the employing establishment reissued the job offer indicating that the position was for a permanent limited-duty modified city carrier. It further noted under the duties, physical requirements and physical restrictions categories that "Employee will have the flexibility to change positions as necessary for personal level of comfort. He may change positions from standing to sitting or vice versa every 45 minutes or as needed. Employee may change positions or a break from duties to stretch as needed or change from sitting to standing."

On August 29, 2002 the employing establishment noted that appellant did not report to work and that the 30-day letter from the Office had expired. It further indicated that the job was still available.

By decision dated September 27, 2002, the Office terminated appellant's wage-loss compensation, effective October 5, 2002, on the grounds that he declined an offer of suitable work.[3] On September 19, 2003 appellant requested reconsideration of the September 27, 2002 decision and argued that the position offered was not suitable as the position description did not meet or state the requirements of light duty as described by his doctor's previous written communications. He submitted October 29, 2002 and September 8, 2003 reports from Dr. Saba which advised that appellant was able to do permanent light-duty work. He additionally stated that appellant should be allowed 15-minute breaks every 45 minutes of working for muscle stretching and position change. If there was no work description that fits this limitation then the alternative would be to allow him to work six hours a day. A copy of Dr. Saba's previous report of August 7, 2002 was also submitted along with the May 15, 2002 functional capacity evaluation previously of record, progress reports from the North Georgia Pain Clinic regarding appellant's individual psychotherapy and a November 19, 2003 letter from Dr. William Freeman, a Board-certified psychiatrist, which advised that appellant was under his care for treatment of a major depressive disorder with recurrent episodes.

By decision dated December 29, 2003, the Office denied modification of the September 27, 2002 decision.

In a letter dated February 1, 2004, appellant again requested reconsideration and argued that the modified city carrier position failed to incorporate Dr. Saba's restrictions noted in his August 7 and October 29, 2002 reports of a 15-minute break every 45 minutes.

[3] The Office advised in its cover letter that appellant's claim for continuing disability had been terminated effective October 6, 2002, while the date of October 5, 2002 was referenced in its decision.

By decision dated February 12, 2004, the Office denied the reconsideration request, finding that the argument submitted by appellant did not meet the requirements for reopening a claim.

LEGAL PRECEDENT -- ISSUE 1

Section 8106(c)(2) of the Federal Employees' Compensation Act provides in pertinent part, "A partially disabled employee who ... refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[4] To prevail under this provision, the Office must show that the work offered was suitable and must inform the employee of the consequences of refusal to accept such employment. An employee who refuses or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified.[5] Section 8106(c) will be narrowly construed as it serves as a penalty provision which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[6] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[7]

The implementing regulation provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.[8] The regulations further provide that the Office shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter the Office's finding of suitability. If the employee presents such reasons and the Office determines that the reasons are unacceptable, it will notify the employee of that determination and that he or she has 15 days in which to accept the offered work without penalty. At that point in time, the Office's notification need not state the reasons for finding that the employee's reasons are not acceptable.[9]

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.[10] In assessing medical evidence, the number of physicians supporting one position or 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

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[4] 5 U.S.C. § 8106(c)(2).

[5] *Janice S. Hodges*, 52 ECAB 379 (2001).

[6] *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[7] *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[8] 20 C.F.R. § 10.517(a).

[9] 20 C.F.R. § 10.516.

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

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.[11]

ANALYSIS -- ISSUE 1

The record in this case indicates that, by letter dated July 26, 2002, the Office advised appellant that a partially disabled employee who refused suitable work was not entitled to compensation and that the offered position had been found suitable. He was notified of the penalty provisions of section 8106 and allotted 30 days to either accept or provide reasons for refusing the position.[12]

On the issue of suitability, the record reflects that Dr. Saba, appellant's neurologist, had signed the June 27, 2002 job offer on July 3, 2002 indicating that appellant was able to perform the duties of the position. The position consisted primarily of sedentary duties, performed from the sitting position, with limited lifting not exceeding 1 to 5 pounds constantly and 10 pounds frequently. Simple grasping and fine manipulation of the hands, along with an occasional driving short distances, writing, bending, squatting, crouching, kneeling, crawling and reaching overhead and forward reaching were required. These physical restrictions of the modified city carrier position offered on June 27, 2002 comported with the findings of the May 15, 2002 functional capacity evaluation. Moreover, all the duties of the modified city carrier position allowed appellant to sit, stand or walk to his personal level of comfort as needed. Accordingly, the medical evidence of record establishes that, at the time the job offer was made, appellant was capable of performing the modified city carrier position.

Following the Office's suitability determination of July 26, 2002, appellant was properly given 30 days to either accept the offer of suitable work or provide reasons for rejecting the offered job. Appellant subsequently submitted an August 7, 2002 report from Dr. Saba in which he requested that the restrictions be permanent and that appellant be allowed a 15-minute break for muscle stretching and position change every 45 minutes. On August 12, 2002 the employing establishment reissued the job offer to incorporate Dr. Saba's August 7, 2002 request that the position be permanent and that appellant be allowed to change positions or take a break from duties to stretch as needed. The record reflects that appellant was given a 30-day period from his July 26, 2002 notification letter to either accept the job or to provide a written explanation for his reasons of refusal. Although appellant submitted Dr. Saba's August 7, 2002 report within the 30-day period, the doctor did not specifically indicate that appellant was unable to perform the offered position. Instead, Dr. Saba generally indicated that appellant could perform the position and noted how the position could be tailored to suit appellant's needs. As the doctor did not indicate that appellant could not perform the job and appellant did not purport to provide any reasons for refusing the job at this time, it was not necessary for the Office to allow appellant a

[11] *Maurissa Mack*, 50 ECAB 498 (1999).

[12] *See* 20 C.F.R. § 10.516.

final 15-day period in which to accept the position.[13] Thus, as appellant did not accept the offered position, the Office properly found that he refused an offer of suitable work.

After the Office issued its decision terminating benefits on September 27, 2002, appellant submitted additional evidence; however, such evidence is insufficient to medically substantiate his refusal of the offered position. The progress notes from the North Georgia Pain Clinic and Dr. Freeman's November 19, 2003 letter fail to address appellant's ability to work in the modified position. Although appellant argued that the August 12, 2002 permanent limited-duty modified city carrier position did not meet the requirements of light duty as Dr. Saba had outlined, a review of Dr. Saba's October 29, 2002 and September 8, 2003 reports support that appellant is able to perform the offered position and contain the same restrictions Dr. Saba had outlined in his August 7, 2002 report, which the August 12, 2002 job offer had incorporated. As previously noted, in his August 7, 2002 report, Dr. Saba agreed that appellant was capable of performing the offered position and stated that appellant should be on permanent light duty as his restrictions are permanent. He further stated that appellant should be allowed every 45 minutes a 15-minute break for muscle stretching and position change. The August 12, 2002 permanent job offer noted under the duties, physical requirements and physical restrictions categories that "Employee will have the flexibility to change positions as necessary for personal level of comfort. He may change positions from standing to sitting or vice versa every 45 minutes or as needed. Employee may change positions or break from duties to stretch as needed or change from sitting to standing." Thus, the August 12, 2002 job offer was consistent with Dr. Saba's restrictions. Moreover, in his subsequent reports of October 29, 2002 and September 8, 2003, Dr. Saba essentially reiterated his opinion that appellant could work permanent light duty and repeated the exact same restrictions he had outlined in his August 7, 2002 report. Thus, other than appellant's own interpretation, the evidence supports that the permanent job position offered on August 12, 2002 was within the restrictions set forth by Dr. Saba. As such, appellant's refusal of an offer of suitable work has not been justified by either the factual or medical evidence.

LEGAL PRECEDENT -- ISSUE 2

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.[14] Section 10.608(b) provides that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[15]

[13] *See id.*

[14] 20 C.F.R. § 10.606(b)(2).

[15] 20 C.F.R. § 10.608(b).

ANALYSIS -- ISSUE 2

Appellant's February 1, 2004 request for reconsideration neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office. Although appellant reiterated that the modified city carrier position failed to incorporate Dr. Saba's restrictions noted in his August 7 and October 29, 2002 reports, the Board notes that the Office previously considered similar contentions. Consequently, he is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).[16]

With respect to the third requirement, constituting relevant and pertinent new evidence not previously considered by the Office, appellant did not submit any "relevant and pertinent new evidence." Thus, he is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2).[17]

CONCLUSION

The Board finds that the refusal of the job offer cannot be deemed reasonable or justified and the Office properly terminated appellant's compensation effective October 5, 2002. The Board additionally finds that the Office properly refused to reopen appellant's claim for further review of the merits of his claim.

[16] 20 C.F.R. §§ 10.608(b)(2)(i) and (ii).

[17] 20 C.F.R. § 10.608(b)(2)(iii).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 12, 2004 and December 29, 2003 are affirmed.

Issued: January 24, 2005
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member