United States Department of Labor
Employees' Compensation Appeals Board

T.T., Appellant	)	
and	)	**Docket No. 06-1674**
	)	**Issued: January 29, 2007**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Swanton, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 17, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated August 22, 2005 and June 14, 2006 terminating her compensation benefits on the grounds that she refused an offer of suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, this Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation benefits effective August 22, 2005 on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On April 5, 2003 appellant, a 34-year-old screener, filed a traumatic injury claim alleging that she injured her right shoulder while removing luggage from a table at the Toledo Express Airport in Swanton, Ohio. The Office accepted her claim for right shoulder sprain and appellant was placed on the periodic rolls. Appellant's claim was later expanded to include a right labrum

tear and right shoulder impingement. She underwent right shoulder arthroscopic surgeries on May 3 and October 4, 2004. Appellant did not return to work.

Appellant was treated by Dr. Paul J. Fenton, a Board-certified orthopedic surgeon. On January 26, 2005 Dr. Fenton released her to work with restrictions, including limited right arm activity. He recommended that appellant be restricted from engaging in any overhead activity or from pushing, pulling or lifting more than 20 pounds at or above shoulder level. On February 7, 2005 the employing establishment offered appellant a limited-duty job encompassing Dr. Fenton's restrictions. Physical requirements of the job included sitting, standing and walking intermittently and grasping for three hours per day. The job required no lifting; twisting; bending; squatting; kneeling; using stairs; driving; or reaching over the shoulder. By letter dated February 9, 2005, appellant notified the employing establishment that she was unable to accept or reject its February 7, 2005 job offer at that time, as the offer had been sent by the employing establishment rather than by the Office.

In a report dated February 28, 2005, Dr. Davis Ervin, a treating physician, provided an impression of postsuperior labrum anterior and posterior lesion repair of the right shoulder. His examination of appellant showed full active and passive range of motion, with pain with extremes of motion. Rotator cuff strength was 5/5. Appellant had a mildly positive O'Brien's test; a negative Speed test; and a negative Yergason test. Dr. Ervin found no anterior or posterior instability or apprehension. On March 31, 2005 the Office asked the employing establishment to clarify the required job duties associated with the modified position offered to appellant.

On April 20, 2004 Dr. Fenton noted that appellant was "doing quite well." He recommended that she have some lifting restrictions, but stated that appellant "certainly [could] do nonheavy lifting type of work." Dr. Fenton's examination revealed passive and active forward flexion up to 170 degrees; active and passive abduction up to 170 degrees; extension to 60 degrees; external rotation to 45 degrees; negative O'Brien's, apprehension and relocation; mild tenderness to palpation of the deep bicipital groove; and tenderness over the lateral acromin. There was no pain over the lateral acromioclavicular (ACV) joint.

The Office referred appellant, together with the entire medical record and a statement of accepted facts, to Dr. Sukhjits S. Purewal, a Board-certified orthopedic surgeon. He was asked to provide an opinion as to whether appellant could return to work and, if so, for his recommended restrictions. In a report dated May 2, 2005, Dr. Purewal provided an accurate history of appellant's injury and treatment. He reviewed the medical record, the statement of accepted facts and a description of appellant's job-related duties. Dr. Purewal's examination of the right shoulder showed active forward flexion and abduction up to 90 degrees. Passively the right shoulder could be moved to 170 degrees. Adduction was 25 degrees and extension was 40 degrees. Internal and external rotation were 70 degrees each. Muscle strength testing revealed moderate weakness during abduction and forward flexion, as well as during external rotation of the right shoulder. He found generalized disuse weakness of the right arm and hand. Sensation was intact and reflexes were normal. Dr. Purewal opined that appellant was unable to perform the duties of her date-of-injury job as screener, because the duties included lifting up to 70 pounds. He recommended that she be permanently restricted from lifting more than 10 pounds with her right arm and shoulder and from reaching above shoulder level with her right arm.

Dr. Purewal further opined that the accepted right shoulder sprain had resolved and reached maximum medical improvement. He noted that appellant still had residual symptoms of pain and weakness of the right shoulder due to the labrum tear. Dr. Purewal opined that the right shoulder impingement had been corrected with surgery. An accompanying work capacity evaluation recommended that appellant be restricted from lifting with her right shoulder and from pushing or pulling more than 10 pounds.

By letter dated May 3, 2005, the employing establishment informed appellant that she was being offered a limited-duty position in compliance with medical restrictions outlined by Dr. Fenton. She was instructed to report for duty on May 12, 2005.

On May 17, 2005 the Office forwarded a copy of Dr. Purewal's May 2, 2005 report to Dr. Fenton for his review and comment. In a May 26, 2005 work capacity evaluation, Dr. Fenton stated that he agreed with Dr. Purewal's May 2, 2005 report. He advised that appellant was able to return to work with restrictions, including no repetitive overhead activity; no lifting above shoulder level; and no lifting over 10 pounds.

By letter dated June 10, 2005, the employing establishment offered appellant the limited-duty position of exit lane monitor. Duties and responsibilities outlined in the June 10, 2005 letter and accompanying limited-duty assignment included assisting in monitoring the flow of passengers through the screening checkpoint and monitoring the exit door to ensure that no one entered the sterile area by passing the security checkpoint. Appellant was permitted to sit or stand at her discretion. Physical requirements involved sitting, walking and standing intermittently for eight hours. The job did not require lifting, bending, twisting, squatting, kneeling, grasping, using stairs or reaching above the shoulder. Appellant was advised to accept or reject the offer of employment by June 17, 2005 and to report to work on June 22, 2005.

The record contains a note from Dr. Fenton dated June 1, 2005 stating that appellant's medical condition prohibited her from performing the duties that her current occupation required. By letter dated June 21, 2005, the Office asked Dr. Fenton to clarify his recommended restrictions and to confirm that he approved of the June 10, 2005 limited-duty job offer. In a report dated June 23, 2005, Dr. Fenton opined that appellant was fully capable of performing the limited-duty job offered to her on June 10, 2005, stating that her medical condition did not prevent her from intermittent sitting or standing.

By letter dated June 28, 2005, the Office notified appellant that it found the exit lane monitor position offered to her on June 10, 2005 to be suitable based on reports of Dr. Fenton and Dr. Purewal. The Office advised her that she had 30 days to accept the offer or provide reasons why she believed the position was not suitable. It informed appellant that, if she failed to accept or demonstrate that her failure was justified, compensation benefits would be terminated. Appellant did not report to work.

By letter dated August 1, 2005, the Office advised appellant that she failed to provide valid reasons for refusing to accept the limited-duty job and that, if she had not accepted the position and arranged for a report date within 15 days of the date of the letter, her entitlement to wage-loss and schedule award benefits would be terminated.

In an undated letter to the employing establishment, received by the Office on August 4, 2005, appellant resigned from her duties as a security screener at the Toledo Express Airport.

By decision dated August 22, 2005, the Office terminated appellant's wage-loss compensation and schedule award benefits, effective that date, on the grounds that she refused an offer of suitable work. On August 25, 2005 appellant, through her counsel, requested an oral hearing. On September 12, 2005 appellant notified the Office that she had moved from Toledo, Ohio to Knoxville, Tennessee.

Appellant did not appear at the March 29, 2006 hearing. Counsel stated that she refused the limited-duty job offer because she had moved to Tennessee. Although he urged appellant to return to Ohio to accept the limited-duty job offer, appellant informed her representative that she was financially unable to do so.

By decision dated June 14, 2006, the Office hearing representative affirmed the termination of compensation on the grounds that appellant refused an offer of suitable employment.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. Under section 8106(c)(2) of the Federal Employees' Compensation Act,[1] the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[2] Office regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured 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 a determination is made with respect to termination of entitlement to compensation.[3] To justify termination, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[4] Before compensation can be terminated, the Office has the burden of demonstrating that the employee can work, setting forth specific restrictions, if any, on the employee's ability to work. The Office must also establish that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.[5]

[1] 5 U.S.C. § 8101 *et seq*.

[2] *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987).

[3] 20 C.F.R. §§ 10.516 and 10.517; *see also Catherine G. Hammond*, 41 ECAB 375 (1990).

[4] *See John E. Lemker*, 45 ECAB 258 (1993).

[5] *Linda Hilton*, 52 ECAB 476, 481 (2001).

If possible, the employer should offer suitable reemployment in the location where the employee currently resides. If this is not practical, the employer may offer suitable reemployment at the employee's former duty station.[6]

ANALYSIS

The Board finds that the Office met its burden of demonstrating that the work offered to appellant was suitable and she failed to show that her refusal to accept the modified-job offer was reasonable or justified. The Office properly terminated her compensation under 5 U.S.C. § 8106(c)(2) for refusing an offer of suitable work.

In a May 2, 2005 report, Dr. Purewal provided an accurate history of appellant's injury and treatment. He indicated that he had reviewed the medical record, the statement of accepted facts and description of her job-related duties. Dr. Purewal's examination of the right shoulder showed active forward flexion and abduction up to 90 degrees. Passively, the right shoulder could be moved to 170 degrees. Adduction was 25 degrees and extension was 40 degrees. Internal and external rotation were 70 degrees each. Muscle strength testing revealed moderate weakness during abduction and forward flexion, as well as during external rotation of the right shoulder. He found generalized disuse weakness of the right arm and hand. Sensation was intact and reflexes were normal. Dr. Purewal opined that appellant was unable to perform the duties of her date-of-injury job as screener, because the duties included lifting up to 70 pounds. He recommended that she be permanently restricted from lifting more than 10 pounds with her right arm and shoulder and from reaching above shoulder level with her right arm. Dr. Purewal further opined that the accepted right shoulder sprain had resolved and reached maximum medical improvement, but concluded that appellant still had residual symptoms of pain and weakness of the right shoulder due to the labrum tear. He noted that the right shoulder impingement had been corrected with surgery. Dr. Purewal recommended that appellant be restricted from lifting with her right shoulder and from pushing or pulling more than 10 pounds. In a May 26, 2005 work capacity evaluation, Dr. Fenton stated that he agreed with Dr. Purewal's May 2, 2005 report. Dr. Fenton indicated that appellant was able to return to work with restrictions, including no repetitive overhead activity; no lifting above shoulder level; and no lifting over 10 pounds. The Board finds that the report of Dr. Purewal, which is well rationalized and based on a thorough review of the record and a comprehensive examination of appellant, represents the weight of the medical evidence and establishes that she was able to be gainfully employed, provided that the position accommodated Dr. Purewal's recommended restrictions. The Board notes that appellant's treating physician, Dr. Fenton, agreed with the opinion of Dr. Purewal.

On June 10, 2005 the employing establishment offered appellant a limited-duty position. As an exit lane monitor, she would be required to assist in monitoring the flow of passengers through the screening checkpoint and monitor the exit door to ensure that no one entered the sterile area by passing the security checkpoint. Appellant was permitted to sit or stand at her discretion. The job required her to sit, walk and stand intermittently for eight hours. The job required no lifting, bending, twisting, squatting, kneeling, grasping, using stairs or reaching

[6] 20 C.F.R. § 10.508 (2006).

above the shoulder. Dr. Fenton opined that appellant was fully capable of performing the limited-duty job offered to her on June 10, 2005, stating that her medical condition did not prevent her from intermittent sitting or standing. The Board finds that the physical requirements of the position of exit lane monitor were within the restrictions recommended by Dr. Purewal and Dr. Fenton.

By letter dated September 22, 2005, the Office notified appellant that it found the exit lane monitor position offered to her on June 10, 2005 to be suitable, based on the reports of Dr. Fenton and Dr. Purewal. The Office advised her that she had 30 days to accept the offer or provide reasons why she believed the position was not suitable. Appellant did not report to work and did not provide reasons for failing to do so. The Office found the limited-duty job to be suitable in that it accommodated the restrictions delineated by Dr. Purewal and Dr. Fenton. 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] The record demonstrates that the physical capacity required for the exit lane monitor position was within appellant's work restrictions, as identified by Dr. Fenton and Dr. Purewal. On August 1, 2005 the Office informed appellant that she had failed to provide valid reasons for refusing the offered position and allowed her 15 additional days to accept the position. The Board finds that the Office met its burden of proving that the work offered was suitable and that appellant was informed of the consequences of her refusal to accept the offered employment.[8] When appellant failed to accept the position within the prescribed 15 days, the Office properly terminated her benefits.

Appellant contended that the position offered was not suitable because she had relocated to Tennessee. The Board finds her argument to be without merit. In *M.L.*,[9] the claimant had relocated during the period of his disability. The employing establishment offered claimant a position in the area where he was employed at the time of his accepted injury. The Office found the position to be suitable. However, the Board held that the suitability of the offered position had not been established, in that the employing establishment had failed to first develop whether suitable reemployment was possible in the location where appellant currently resided. This case is distinguishable from *M.L.* In the instant case, appellant continued to reside in the area where she was employed at the time of her accepted injury, until after a suitable position was offered to her. She did not notify the Office of her move to Tennessee until September 12, 2005, following the termination of her compensation benefits on August 22, 2005. The federal regulations provide that an employer should offer suitable reemployment in the location where the employee currently resides, if possible.[10] However, in this case appellant relocated following the termination of benefits.

[7] *Marilyn D. Polk*, 44 ECAB 673 (1993).

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

[9] *M.L.*, 57 ECAB ___ (Docket No. 06-136, issued September 25, 2006).

[10] *See* 20 C.F.R. § 10.508.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective August 22, 2005 for refusing a suitable job offer.

ORDER

IT IS HEREBY ORDERED THAT the June 14, 2006 and August 22, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 29, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board