United States Department of Labor
Employees' Compensation Appeals Board

J.P., Appellant	)	
and	)	**Docket No. 07-652**
	)	**Issued: June 13, 2007**
DEPARTMENT OF THE ARMY, U.S. ARMY FORCES COMMAND, Fort McCoy, WI, Employer	)	

Appearances:
William Skemp, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 9, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated February 27, 2006 terminating his compensation benefits on the grounds that he refused an offer of suitable work, and an October 13, 2006 nonmerit decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, this Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation benefits effective February 27, 2006 on the grounds that he refused an offer of suitable work; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On August 16, 2002 appellant, a 27-year-old materials handler, filed a traumatic injury claim alleging that he injured his right shoulder and neck while lifting freight off a loading dock. The Office accepted appellant's claim for right shoulder impingement and right shoulder lesion. The Office authorized right shoulder arthroscopic repair, which occurred on October 30, 2002, and placed appellant on the periodic rolls.

On November 25, 2002 the Office asked the employing establishment to clarify appellant's employment status on the date of injury. On December 11, 2002 Ann Sprain of the employing establishment stated that, on the date of injury, appellant was a temporary employee, working 40 hours per week, at an hourly rate of $12.68.

Appellant was treated by Dr. Charles Nolte, a Board-certified osteopath, specializing in family practice. On March 24, 2003 he was released to limited duty with restrictions, including no lifting greater than 10 pounds above the shoulder. In a June 9, 2003 work restriction evaluation, Dr. Nolte indicated that appellant was able to work full time with restrictions. Appellant was prohibited from lifting more than five pounds and from reaching above his shoulder.

On April 15, 2003 appellant was referred for vocational rehabilitation. Rehabilitation reports from counselor Thomas Heiman, dated June 30, 2003 to August 9, 2004, reflect that appellant refused to cooperate with vocational rehabilitation. Mr. Heiman stated that appellant refused to return his telephone calls; failed to show up for scheduled appointments; and failed to follow up on job leads.

The Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Amulf Svendsen, a Board-certified orthopedic surgeon, for a second opinion examination. Dr. Svendsen was asked as to whether appellant was capable of performing the duties of his date-of-injury job as a materials handler. The April 21, 2005 statement of accepted facts notes that a materials handler must be physically capable of remaining on his feet for long periods of time; of stooping, bending, pushing, pulling, reaching, and exercising normal body movements; of regularly lifting 40 pounds, occasionally lifting 60 pounds, and lifting over 60 pounds with machinery or coworkers.

In a report dated July 13, 2005, Dr. Svendsen provided an accurate history of appellant's injury and treatment. He reviewed the medical record, the statement of accepted facts, and the description of appellant's job-related duties. Dr. Svendsen's examination of the cervical spine revealed full range of flexion, extension, rotation and lateral deviation without discomfort. He found no evidence of any muscle atrophy in the upper extremity. Examination of the right shoulder showed full flexion, extension and abduction, as well as internal and external rotation. Dr. Svendsen found no significant restriction of any motion. Muscle strength testing was Grade 5 in all muscle groups of the upper extremity. Appellant complained of some discomfort with marked forced abduction, particularly greater than 90 degrees on the right shoulder. Although he found no specific tenderness over the long head of the biceps tendon, he noted some deep discomfort over the acromion process. The neurological examination of the right upper extremity was normal. Appellant found some slight tenderness over the radial humeral joint

consistent with a low-grade lateral epicondylitis. Dr. Svendsen diagnosed status post arthroscopic repair of Type II SLAP lesion of the right shoulder. He opined that appellant was medically capable of performing the duties of his date-of-injury job as described in the statement of accepted facts, with strict adherence to the 60-pound lifting restriction, not to be performed on a repetitive basis. In an accompanying work capacity evaluation, Dr. Svendsen placed a checkmark in the "no" box, in response to the question as to whether appellant was able to perform the duties of his usual job. He indicated that appellant was able to work eight hours per day, provided that he be restricted from pulling or lifting more than 60 pounds.

On July 27, 2005 the Office asked Dr. Svendsen to clarify his July 13, 2005 report as to whether appellant was medically capable of performing his date-of-injury job as a materials handler. On July 30, 2005 Dr. Svendsen stated that appellant could perform the duties of his date-of-injury job, so long as his required lifting was restricted to the stated 60 pounds.

On September 13, 2005 the employing establishment offered appellant a limited-duty position as a vehicle registration clerk, which encompassed Dr. Svendsen's restrictions. The position was listed as temporary. Appellant was instructed to begin work on October 3, 2005. The position was to end no later than September 30, 2006. The position description identified a variety of administrative functions in support of vehicle registration. Physical requirements of the job excluded lifting or pushing anything greater than 80 pounds, or lifting or pushing greater than 60 pounds on a repetitive basis. On September 28, 2005 appellant rejected the September 13, 2005 job offer on the recommendation of his lawyer.

On September 30, 2005 the employing establishment offered appellant a limited-duty position as a vehicle registration clerk. The duties of the job were identical to those of the position offered on September 13, 2005. However, the physical requirements of the job excluded lifting or pushing anything greater than 60 pounds, or lifting or pushing greater than 60 pounds on a repetitive basis. The employing establishment informed appellant that the position was in compliance with medical restrictions outlined by Dr. Svendsen. Appellant was instructed to report for duty on October 17, 2005. The position was temporary, not to continue past October 16, 2006.

On October 4, 2005 the employing establishment sent an email to appellant asking him to respond to the September 30, 2005 job offer, which modified his lifting restrictions. The establishment indicated that appellant had responded twice to the September 27, 2005 offer, but had not responded to the September 30, 2005 offer. The record contains a September 29, 2005 vocational report reflecting appellant's continued noncompliance.

By letter dated November 22, 2005, the Office notified appellant that it found the vehicle registration clerk position to be suitable, based on Dr. Svendsen's July 13, 2005 report. The Office informed appellant that the position was currently available; that he would be paid compensation based on the difference, if any, between the pay of the offered position and the pay of his position on the date of injury; and that he would be able to accept the position with no penalty. The Office advised appellant that he had 30 days to accept the offer or provide reasons why he believed the position was not suitable.

On December 9, 2005 appellant declined the position of vehicle registration clerk offered by the employing establishment on September 30, 2005. He submitted no evidence or argument in support of his refusal.

By letter dated December 20, 2005, the Office advised appellant that he had failed to provide valid reasons for refusing to accept the limited-duty job and that, if he had not accepted the position and arranged for a report date within 15 days of the date of the letter, his entitlement to wage loss and schedule award benefits would be terminated. Appellant did not respond.

By decision dated February 27, 2006, the Office terminated appellant's wage-loss benefits effective that date, on the grounds that he had refused an offer of suitable work. The Office found that the weight of the medical evidence was encompassed in Dr. Svendsen's second opinion report.

On August 23, 2006 appellant, through his representative, requested reconsideration. Appellant contended that he had, in fact, contacted the Office to discuss why he believed the position offered was unsuitable. He noted that he still had residual loss of strength related to the August 2002 injury, and, due to continuing partial disability, his benefits should not be terminated.

Appellant submitted an October 19, 2005 report from Dr. Nolte, who opined that appellant had a 10 percent permanent disability related to his right shoulder, based on surgical repair of a labral tear and residual strength loss. Examination of the right shoulder revealed full range of motion; 4+/5 strength; and some discomfort with throwing, abduction and external rotation movements.

By decision dated October 13, 2006, the Office denied appellant's request for reconsideration, finding that the evidence and argument submitted was insufficient to warrant merit review.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[1] The Office has authority under section 8106(c)(2) of the Act to terminate compensation for any partially disabled employee who refuses or neglects to work after suitable work is offered.[2] To justify termination, the Office must show that the work offered was suitable, that appellant was informed of the consequences of his refusal to accept such employment and that he was allowed a reasonable period to accept or reject the position or submit evidence or reasons why the position is not suitable and cannot be accepted.[3]

[1] *Willa M. Frazier*, 55 ECAB 379 (2004); *see also Roberto Rodriguez*, 50 ECAB 124 (1998).

[2] 5 U.S.C. § 8106(c).

[3] *See Ronald M. Jones*, 52 ECAB 190, 191 (2000); *see also Maggie L. Moore*, 42 ECAB 484, 488 (1991), *reaff'd on recon.*, 43 ECAB 818, 824 (1992). *See also* 20 C.F.R. § 10.516. (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 counteract the Office's finding of suitability.)

Office regulation provides that, in determining what constitutes suitable work for a particular disabled employee, it will consider the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors.[4] 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.[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 to work is reasonable or justified.[6]

ANALYSIS -- ISSUE 1

The Board finds that the Office properly terminated appellant's compensation and schedule award benefits under 5 U.S.C. § 8106(c)(2) for refusing an offer of suitable work.

In a July 13, 2005 second opinion report, Dr. Svendsen opined that appellant was medically capable of performing the duties of his date-of-injury job, with a 60-pound lifting restriction, not to be performed on a repetitive basis. The Board finds that the weight of medical evidence is represented by Dr. Svendsen's report, which was thorough and well rationalized. Dr. Svendsen's provided a comprehensive review of the factual and medical evidence, detailed his findings on physical examination of appellant, and provided discussion for the conclusions he reached. The Board notes that there is no other contemporaneous medical evidence of record relevant to the issue of appellant's ability to perform the duties of the position offered by the employing establishment. On the basis of Dr. Svendsen's report, the employing establishment identified a temporary, limited-duty assignment in appellant's commuting area that entailed a variety of administrative functions in support of vehicle registration. Physical requirements of the job excluded lifting or pushing anything greater than 60 pounds. The record thus establishes that the position offered was within appellant's work restrictions. Furthermore, the offer was in writing, included a description of the duties of the position, the physical requirements of those duties, and the date by which appellant was to either accept the offer or submit his reasons for refusal.[7] The Board finds that the Office met its burden to establish that the position was suitable.[8]

The issue of whether an employee has the physical ability to perform the duties of a modified position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence.[9] In this case, the medical evidence provided by

[4] *Rebecca L. Eckert*, 54 ECAB 183 (2002).

[5] 20 C.F.R. § 10.517. *See Kathy E. Murray*, 55 ECAB 288 (2004); *see also Ronald M. Jones, supra* note 3.

[6] *Id.*

[7] *See* 20 C.F.R. § 10.507.

[8] The Board notes that the temporary nature of the job offered does not render it unsuitable, as appellant held a temporary position on the date of injury.

[9] *See Maurissa Mack*, 50 ECAB 498, 502 (1999).

Dr. Svendsen establishes the suitability of the offered position, in that the job offered satisfied his physical limitations.

Because appellant was offered a suitable job, he had the burden to demonstrate that his refusal was justified. The Board finds that the Office complied with its procedural requirements in advising him that the position was found suitable and providing him with the opportunity to accept the position or provide his reasons for refusing. The record reflects that, although appellant declined the job on December 9, 2005, he did not submit any evidence or argument showing that the offered position was not medically suitable. He did not respond to the Office's December 20, 2005 notice advising him that he had failed to provide valid reasons for refusing to accept the limited-duty job and that, if he had not accepted the position and arranged for a report date within 15 days of the date of the letter, his entitlement to wage loss and schedule award benefits would be terminated. Accordingly, the Office met its burden of proof to terminate his compensation based on his refusal of suitable work.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Act, the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[10] which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, which sets forth arguments and contains evidence that:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
>
> "(ii) Advances a relevant legal argument not previously considered by the (Office); or
>
> "(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office]."

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[11]

Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[12]

[10] 20 C.F.R. § 10.606(b).

[11] *Id.*

[12] *See Helen E. Paglinawan*, 51 ECAB 591 (2000).

ANALYSIS -- ISSUE 2

Appellant's August 23, 2006 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. Appellant merely argued that the position offered was unsuitable, and that his benefits should not have been terminated due to his continuing partial disability. 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).

Appellant submitted an October 19, 2005 report from Dr. Nolte, who opined that appellant had a 10 percent permanent disability related to his right shoulder, based on surgical repair of a labral tear, as well as residual strength loss he still experienced. However, Dr. Nolte's report is not relevant to the issue at hand, as it did not address whether appellant was capable of performing the duties of the position offered to him by the employing establishment. Therefore, his report does not constitute relevant and pertinent new evidence not previously considered by the Office,[13] and the Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2), and properly denied his August 23, 2006 request for reconsideration.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective February 27, 2006 for refusing a suitable job offer. The Board further finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[13] *See Susan A. Filkins*, 57 ECAB ___ (Docket No. 06-868, issued June 16, 2006).

ORDER

IT IS HEREBY ORDERED THAT the October 13 and February 27, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 13, 2007
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board