

On March 31, 2004 Dr. David W. Parliament, appellant's treating chiropractor, stated that it was unknown when appellant could return to work. On May 6, 2004 Dr. Edward M. Voke, a Board-certified orthopedic surgeon, diagnosed a herniated nucleus pulposis at L5-S1 on the left. He stated that appellant should be off work for one month. In June 11 and 16, 2004 reports, Dr. Voke indicated that appellant's disc herniation had subsided. He recommended that appellant pursue conservative treatment.

In a June 25, 2004 report, Dr. Shawn P. Johnston, a Board-certified physiatrist to whom appellant was referred by Dr. Voke, diagnosed large L5-S1 disc extrusion and left S1 radiculopathy. Dr. Johnston indicated that appellant would receive an epidural injection and physical therapy. In a July 16, 2004 report, Dr. Johnston noted that appellant's symptoms had returned and that surgery might be needed. On August 6, 2004 he advised that appellant could work light duty, but on August 13, 2004 he opined that appellant was totally disabled. On August 18, 2004 Dr. Voke stated that appellant's disc herniation had completely subsided but he continued to experience chronic radiculopathy or inflammation at S1.

In a September 28, 2004 report, Dr. James M. Eule, a Board-certified orthopedic surgeon, diagnosed lumbar degenerative disc disease at L4-5 and L5-S1. He indicated that surgery would not likely provide complete relief of appellant's symptoms. On October 4, 2004 Dr. Eule indicated that appellant could return to work on October 1, 2004. The employing establishment advised that appellant returned to work for four hours daily on October 19, 2004.¹

The employing establishment forwarded a December 14, 2004 investigative memorandum suggesting that appellant's physical capabilities had improved. The memorandum advised that appellant was observed engaging in various activities and videotaped performing such activities. On January 18, 2005 the Office requested information from Dr. Johnston concerning appellant's physical capabilities as shown in an investigative videotape.

In a January 13, 2005 diagnostic report, Dr. John McCormick, a Board-certified radiologist, stated that a magnetic resonance imaging (MRI) scan of appellant's lumbar spine revealed a mild protrusion at L5-S1, which had subsided over the previous year. It also identified mild diffuse annular bulging at L4-5 and multilevel desiccation of disc material.

In a January 25, 2005 report, Dr. Johnston noted reviewing the videotape regarding appellant. He opined that, while appellant could perform "some bending, lifting and twisting kinds of activities," appellant was still unable to return to regular duty as he would likely have intermittent flare-ups of his condition that would preclude full duty. Dr. Johnston opined that appellant could return to full-time work with restrictions "of essentially a light-duty job with occasional lifting, bending and twisting but not to exceed lifting, pushing or pulling of 20 pounds."

On February 11, 2005 the employing establishment offered appellant a limited-duty job assignment. The job duties included driving for four to six hours as well as pushing, pulling and

¹ Appellant subsequently submitted claims for intermittent disability which were denied in an April 11, 2005 Office decision. In Docket No. 05-1216 the Board remanded this to the Office. As of the filing of the present appeal, the Office had not reissued the April 11, 2005 decision.

lifting 20 pounds or less for one to two hours. The assignment would require appellant to case letters and flat first class mail for one to two hours, deliver parcels of 20 pounds or less for four to six hours, perform quality checks for one to two hours, and carry and deliver mail for one to two hours.

By letter dated February 15, 2005, the Office advised appellant that the job offer constituted suitable work. Appellant was provided 30 days to accept the position or give reasons for refusing it; otherwise, he risked termination of his compensation benefits.

In a February 15, 2005 report, Dr. Johnston diagnosed lumbar disc herniation at L5-S1 and lower back pain with radicular features. He found that appellant could return to full-time light-duty work. Dr. Johnston based his opinion on both the employing establishment's investigative videotape, which "showed that [appellant] was capable of being able to do some bending, lifting and twisting kind of activities," and on his assessment of appellant's ongoing symptoms. He reiterated that appellant was "capable of returning to work full time with the restrictions of only occasional lifting, bending and twisting, but no lifting, pushing or pulling to exceed 20 pounds." Dr. Johnston noted that appellant disagreed with his opinion "even presuming that he does have a disc herniation." In a February 24, 2005 work capacity report, he listed that appellant could work eight hours per day within specified medical restrictions. Dr. Johnston opined that appellant could lift up to 25 pounds on an occasional basis and was able to perform all of the duties required in the position description, including driving.

By letter dated March 15, 2005, appellant declined the limited-duty job offer. He contended that he had received inadequate medical treatment and that, "for this reason, I am declining the job offer." Appellant further asserted:

"I will not return to work until I have received the medical services needed to improve my injury. I suffer from a herniated disc. This type of injury does not just resolve itself on its own, though it may improve while the patient is off work, it will always be there unless treated properly. I will not risk more damage to my physical well being by returning to work before I am physically able to perform the duties assigned to me as I am sure that you would not want a medical liability working in your station."

By letter dated April 7, 2005, the Office informed appellant that it had considered his stated reasons for refusing the limited-duty job offer and found that they were not valid. The Office provided appellant 15 additional days to accept the position, after which his entitlement to compensation would be terminated. He did not respond.

In an April 28, 2005 decision, the Office terminated appellant's entitlement to wage-loss compensation, effective the same day, on the grounds that he refused an offer of suitable work.

Appellant appealed the Office's decisions to the Board. By order dated November 1, 2005, the Board remanded the case to the Office for reconstruction of the record.² The Board directed the Office to issue a decision to fully protect appellant's appeal rights.

² *Mike T. McDonald*, Docket No. 05-1216 (issued November 1, 2005).

On August 21, 2006 the Office contacted the employing establishment and confirmed that the offered position, within appellant's restrictions, remained available.

By decision dated August 23, 2006, the Office reissued its April 28, 2005 decision, effective August 23, 2006, terminating appellant's entitlement to wage-loss benefits.

LEGAL PRECEDENT

Section 8106(c) of the Federal Employees' Compensation Act³ provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee is not entitled to compensation. The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.⁴ In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused or neglected by the claimant was suitable.⁵

Section 10.516 of the applicable regulation states:

“[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.”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 regulation⁸ also provides that an employee who refuses or neglects to work, after suitable work has been offered or secured for the employee, then has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided

³ 5 U.S.C. § 8106(c)(2).

⁴ *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

⁵ *Glen L. Sinclair*, 36 ECAB 664 (1985).

⁶ 20 C.F.R. § 10.516.

⁷ *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

⁸ 20 C.F.R. § 10.517(a).

with the opportunity to make such a showing before entitlement to compensation is terminated.⁹ Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer, medical evidence of inability to do the work or travel to the job, or that the claimant found other work which fairly and reasonably represents his wage-earning capacity (in which case compensation would be adjusted or terminated based on actual earnings). 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

ANALYSIS

The Board finds that the Office properly terminated appellant's wage-loss compensation on the grounds that he refused an offer of suitable work. Appellant's claim was accepted by the Office for lumbosacral subluxation. He was treated by Dr. Johnson who diagnosed an L5-S1 disc with radiculopathy.

In a January 25, 2005 report, Dr. Johnston advised that, while appellant might have intermittent symptoms upon returning to work, he was capable of working full time within restrictions. Specifically, Dr. Johnston stated that appellant could work a light-duty job and could perform occasional lifting, bending and twisting, but could not lift, push or pull loads in excess of 20 pounds. After receipt of Dr. Johnston's January 25, 2005 report, the Office informed appellant on February 15, 2005, that it had found the limited-duty position to be suitable work.

Dr. Johnston also provided a February 15, 2005 report, confirming that appellant was capable of performing a full-time light-duty position. He again specified that appellant could perform occasional lifting, bending and twisting, but was not to lift, push or pull loads greater than 20 pounds. Dr. Johnston also noted that his opinion was based on his review of the investigative videotape, as well as his physical examinations of appellant and current impression of appellant's symptoms. In a February 24, 2005 report, he certified that appellant was capable of working eight hours per day in a limited capacity. Dr. Johnston indicated that appellant could lift up to 25 pounds on an occasional basis, and was able to sit, stand, walk and lift for up to four hours intermittently, and could bend, squat, climb, kneel and twist for one hour intermittently. He noted that appellant could reach above his shoulder and operate a motor vehicle.

The employing establishment's limited-duty job offer required, on average, between four and six hours of driving and between one and two hours of lifting 20 pounds or less, pushing and pulling. The Board finds that the medical evidence establishes that the job offered to appellant by the employing establishment and found suitable by the Office on February 15, 2005 was within the restrictions set forth by Dr. Johnston on January 25, 2005 and that appellant was capable of performing the modified position. There is no medical evidence of record indicating that appellant could not perform the duties of the offered position.

⁹ See *John E. Lemker*, 45 ECAB 258 (1993).

¹⁰ See *Marilyn D. Polk*, 44 ECAB 673 (1993).

To properly terminate compensation under section 8106(c)(2), the Office must provide appellant notice of its finding that an offered position is suitable and give him an opportunity to accept or provide reasons for declining the position.¹¹ The Office properly followed its procedural requirements in this case. By letter dated February 15, 2005, the Office advised appellant that a partially disabled employee who refused suitable work was not entitled to compensation, that the offered position had been found suitable, and allotted him 30 days to either accept or provide reasons for refusing the position.¹² He refused the position on March 15, 2005, asserting that he had received inadequate medical care. Appellant stated that he would not return to work until he had “received the medical services needed to improve my injury.” He further asserted that he risked further injury if he returned to work. However, the Board notes that fear of future injury is not compensable under the Act.¹³ Further, as noted, 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.

On April 7, 2005 the Office informed appellant that his reason for declining the limited-duty assignment was unacceptable. The Office concluded that appellant refused to return to suitable employment despite his treating physician’s opinion that he was capable of working full time in a light-duty assignment. The Office provided appellant 15 days to accept the position without penalty or provide an acceptable reason for refusing to do so before all entitlement to wage-loss compensation was terminated. Appellant did not accept the offered position nor did he submit any medical evidence to show that the offered position was not medically suitable.¹⁴ Furthermore, upon remand following the Board’s November 1, 2005 order, the Office confirmed with the employing establishment that the offered job remained available.

The Board finds that the Office met its burden of proof to terminate appellant’s entitlement to wage-loss compensation effective August 23, 2006. Thereafter, the burden shifted to appellant to show that his refusal of the offered position was justified.¹⁵ However, as noted, appellant submitted no medical evidence supporting that he was incapable of performing the duties of the offered position.

¹¹ See *Maggie L. Moore*, *supra* note 7.

¹² See *Bruce Sanborn*, 49 ECAB 176 (1997).

¹³ See *Mary Geary*, 43 ECAB 300, 309 (1991); *Pat Lazzara*, 31 ECAB 1169, 1174 (1980) (finding that appellant’s fear of a recurrence of disability upon return to work is not a basis for compensation).

¹⁴ See *Les Rich*, 54 ECAB 290 (2003).

¹⁵ See *Ronald M. Jones*, 52 ECAB 190 (2000).

CONCLUSION

The Board finds that the Office properly terminated appellant's entitlement to compensation on the grounds that appellant refused an offer of suitable work.¹⁶

ORDER

IT IS HEREBY ORDERED THAT the August 23, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 23, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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

¹⁶ The Office did not reissue its April 11, 2005 decision or otherwise readjudicate the claimed periods of wage-loss compensation that were denied in the April 11, 2005 decision, all of which predated the August 23, 2006 effective date of the termination of wage-loss benefits affirmed herein. Consequently, these periods of claimed wage loss are not before the Board in the present appeal. 20 C.F.R. § 501.2(c). However, the Board notes that its November 1, 2005 order remanding case specifically directed the Office to issue an appropriate decision to fully protect appellant's appeal rights. The Board notes that its determinations are binding upon the Office and must, of necessity, be so accepted and acted upon by the Director of the Office. Otherwise, there could be no finality of decisions and the whole appeals procedure would be nullified and questions would remain moot. *See Paul Raymond Kuyoth*, 27 ECAB 498, 503-04 (1976); *Anthony Greco*, 3 ECAB 84, 85 (1949). In view of this, the Office is required to complete the actions directed by the Board in its prior order and issue an appropriate merit decision on the issue of appellant's entitlement to wage-loss compensation for the periods specifically claimed and originally adjudicated in the Office's April 11, 2005 decision.