United States Department of Labor
Employees' Compensation Appeals Board

R.M., Appellant	)	
and	)	**Docket No. 08-1736**
	)	**Issued: June 9, 2009**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Lexington, KY, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 3, 2008 appellant filed a timely appeal from an Office of Workers' Compensation Programs decision dated April 4, 2008. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

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

FACTUAL HISTORY

On September 9, 1998 appellant, a 54-year-old chief security officer, injured his right shoulder when he slipped and fell on a wet floor. He filed a claim for benefits on September 10, 1998, which the Office accepted for right shoulder strain right shoulder capsulitis.

On February 25, 1999 appellant underwent surgery for a right shoulder arthroscopy and capsular release. The surgery was performed by Dr. W. Ben Kibler, Board-certified in

orthopedic surgery and the attending physician. Appellant returned to light duty on March 3, 1999, with restrictions of no lifting more than 10 pounds, no work at or above the shoulder level.

Appellant returned to light duty until August 1, 2004, when he voluntarily separated from employment and began receiving Office of Personnel Management (OPM) retirement benefits.

In a Form CA-7 dated January 19, 2005, appellant requested a change from OPM retirement benefits to temporary total disability compensation under the Federal Employees' Compensation Act. He again requested the elective change by letter dated April 23, 2005. The Office granted appellant's request and paid him temporary total disability compensation.

By letter dated May 20, 2005, the employing establishment advised the Office that it was willing to offer modified duty for appellant and was in the process of developing a position for him which would meet his physical restrictions.

In order to determine appellant's current condition and whether he was capable of returning to gainful employment, the Office referred him for a second opinion examination with Dr. Bryant A. Bloss, a Board-certified orthopedic surgeon.[1] In a report dated February 19, 2007, Dr. Bloss noted appellant's complaints that his right shoulder was lower than his left, that he was not able to raise his right arm and that he had markedly limited range of motion. On examination he noted pain in the right shoulder joint, with tingling in to the shoulder blade and shooting pain down the right arm to just above the elbow. Dr. Bloss stated that appellant's right arm had one centimeter of atrophy in his forearm compared to the left. He diagnosed rupture of the right shoulder cuff and adhesive capsulitis of the right shoulder. Dr. Bloss stated:

> "It is my opinion that [appellant] is unable to perform his usual job as a police officer for [the employing establishment] because he has significant limitation of motion of his right arm, which is his gun handling arm. He also would not be able to man handle an unruly prisoner, because of his painful limitation of motion of his right shoulder and weakness of his right arm."

Dr. Bloss opined that appellant would be able to work eight hours a day in a limited capacity performing light/sedentary duties, which did not require lifting with his right hand, pushing/pulling, kneeling, squatting, climbing, reaching, reaching above the shoulder or overhead activity with his right arm. He restricted appellant to bending and stooping for no more than two hours and any lifting exceeding one hour or 10 pounds. Dr. Bloss advised that appellant had no limitation with sitting, walking, standing, or twisting, repetitive movement of wrist and elbow.

On February 1, 2008 the employing establishment offered appellant a job as a safety and occupational health specialist based on the restrictions outlined by Dr. Bloss. The job offer

[1] The Office and the employing establishment had attempted to develop the medical evidence and determine whether appellant could perform suitable work for two years. In a memorandum dated January 11, 2007, it stated that a conflict existed in the medical evidence between appellant's treating physician, Dr. Jeffrey L. Riney, Board-certified in family practice and a second opinion physician; however, it noted in the memorandum that the second opinion examiner's report dated October 11, 2005, had become stale. It therefore referred appellant to a new second opinion physician, Dr. Bloss, for an updated medical examination.

stated that the physical requirements of the position involved light physical efforts to perform the assigned duties, that the majority of the work could be performed sitting and in an indoor atmosphere with adequate temperature and lighting and that the position was specifically within the restrictions set forth by Dr. Bloss.[2]

On February 14, 2008 appellant rejected the position, stating that he was physically unable to work at any job due to his accepted right shoulder condition as well as a right knee condition, which was documented by his treating physician, Dr. Riney, in an October 4, 2007 report.[3] In his October 4, 2007 report, Dr. Riney stated:

> "I examined [appellant] in my office on July 3, 2007. He is having a lot of pain from his injury in 1998. [Appellant] still experiences contractures in his right hand and degenerative changes and pain in his right knee. Because of this he is unable to perform duties of his prior job and any kind of other job duties. This also makes performing daily living activities painful and difficult for [appellant]."

By letter dated February 26, 2007, the Office advised appellant that a suitable position as a safety and occupational health specialist was available and that pursuant to section 8106(c)(2), he had 30 days to either accept the job or provide a reasonable, acceptable explanation for refusing the offer. It advised appellant that it would be terminating his compensation based on his refusal to accept a suitable position which reflected his ability to work as a safety and occupational health specialist for eight hours per day. The Office stated that if appellant refused the job or failed to report to work within 30 days without reasonable cause, it would terminate her compensation under 5 U.S.C. § 8106(c)(2).[4]

By letter dated March 17, 2008, the Office advised appellant that he had 15 days in which to accept the position, or it would terminate his compensation. Appellant did not respond within 15 days.

By decision dated April 4, 2008, the Office terminated appellant's compensation benefits on the grounds that he refused an offer of suitable work.

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[2] The job description for safety and occupational health specialist stated that the employee would use formal and informal training to perform inspections for hazardous and nonhazardous work operations and conditions, recommend measures to eliminate or control practices and conditions which may cause or have the potential to cause injury, illness or fires, independently perform inspections of warehouse and contents, industrial shops and machinery, administrative laboratories, medical wards and unoccupied areas; prepare for and provide technical training to supervisors and employees covering a variety of safety, occupational health and fire protection subjects, including accident prevention, fire prevention and safe work practices; promote safety campaigns through oral presentations, developing and posting safety displays and publishing mishap prevention articles, develop inspection forms utilizing the latest edition of the Life Safety Code, perform inspections on contact nursing homes, residential care homes and halfway houses, prepare a written report of findings, propose corrective measures for unsafe conditions, hazardous work practices and noncompliance with required regulations, input and retrieve data from the engineering service computer system to assist in analyzing accident and injury reports, study data to discover trends and mishap causes and develop recommendations for eliminating or controlling the hazards detected.

[3] Appellant's denial was received by the Office on February 26, 2008.

[4] 5 U.S.C. § 8106(c)(2).

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 Act[5] 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.[6] Section 10.517 of the Office's regulations provides 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.[7]

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.[8] However, all of appellant's medical conditions whether work related or not, must be considered in assessing the suitability of the position.[9]

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.[10] This burden of proof is applicable if the Office terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work.

ANALYSIS

The Board reverses the Office's April 4, 2008 termination decision, as the Office failed to meet its burden to establish that appellant refused a suitable position. The determination 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 the medical evidence.[11] In the instant case, Dr. Bloss indicated in his February 14, 2007 report, that appellant could perform sedentary work for eight hours a day with restrictions on lifting with his right hand, pushing/pulling, kneeling, squatting, climbing, reaching, reaching above the shoulder or overhead activity with his right arm, bending and stooping exceeding two hours and lifting exceeding one hour or 10 pounds. The employing establishment offered appellant a job on

[5] 5 U.S.C. § 8101 *et seq*.

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

[7] 20 C.F.R. § 10.517; *see also Catherine G. Hammond*, 41 ECAB 375 (1990).

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

[9] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (December 1993).

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

[11] *Robert Dickinson*, 46 ECAB 1002 (1995).

February 1, 2008 as a safety and occupational health specialist based on Dr. Bloss' February 2007 report and work-capacity evaluation. However, appellant subsequently submitted an October 4, 2007 report from his treating physician, Dr. Riney, which indicated that appellant was still experiencing disabling pain from his accepted shoulder condition in addition to pain in his right knee, which rendered him unable to perform the duties of not only his prior job but any other kind of job.

Once appellant submitted this additional medical evidence indicating he had greater physical restrictions than those upon which the safety and occupational health specialist position was based, and created a conflict in the medical evidence regarding his fitness for the position, the offered position was no longer suitable. The Office is required to include those conditions, regardless of etiology, which existed prior to the job offer.[12] It, however, failed to consider this countervailing evidence of additional work restrictions and increasing syptomatology in determining whether the position it offered to appellant was suitable. As it is the Office's burden of proof to establish that appellant refused a suitable position, it did not meet its burden of proof in this case to terminate appellant's compensation benefits pursuant to 5 U.S.C. § 8106.[13] Accordingly, the Board will reverse the Office's April 4, 2008 decision.

CONCLUSION

The Board finds that the Office did not meet its burden to terminate appellant's compensation benefits pursuant to 5 U.S.C. § 8106.

[12] *See* 20 C.F.R. § 10.124(c).

[13] *Barbara R. Bryant*, 47 ECAB 715 (1996).

ORDER

IT IS HEREBY ORDERED THAT the April 4, 2008 decision of the Office of Workers' Compensation Programs' be reversed.

Issued: June 9, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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