United States Department of Labor
Employees' Compensation Appeals Board

H.P., Appellant	)	
	)	**Docket No. 08-2036**
and	)	**Issued: May 15, 2009**
	)	
U.S. POSTAL SERVICE, SUNSET STATION, Los Angeles, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 17, 2008 appellant filed a timely appeal from a November 8, 2007 decision of the Office of Workers' Compensation Programs denying modification of a September 12, 2006 decision terminating his compensation benefits for refusing an offer of suitable work and an April 23, 2008 nonmerit decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly denied modification of its decision terminating appellant's compensation based on her refusal of suitable work; and (2) whether the Office abused its discretion in denying appellant's request for reconsideration.

FACTUAL HISTORY

On July 14, 2003 appellant, then a 38-year-old custodial laborer filed an occupational disease claim alleging that he injured his back due to heavy lifting and pulling required in his

job. The Office accepted his claim for cervical and lumbar strains. It later expanded his claim to include herniated discs at L2-3 and L5-S1. Appellant stopped work on December 15, 2003.

Appellant was released to modified duty as of April 12, 2005 by his attending physician, Dr. Michael D. Smith, a Board-certified orthopedic surgeon, who was referred for vocational rehabilitation services on February 7, 2006. In a work capacity evaluation dated March 16, 2006, Dr. Smith indicated that appellant could work eight hours a day. His permanent work restrictions included no twisting, bending, stooping, squatting or climbing, limited reaching and reaching above the shoulder, two-hour limitations on sitting, walking and standing and a 10-minute break every hour.

On August 4, 2006 the employing establishment offered appellant a position as a modified custodial laborer for eight hours a day, effective August 19, 2006, based on the work restrictions provided by Dr. Smith on March 16, 2006. The job description indicated that sitting, walking and standing were limited to two hours, reaching and reaching above the shoulder was limited, there was no pushing or pulling above shoulder level and there was no twisting, bending, stooping, squatting or climbing.

On August 9, 2006 the Office advised appellant that the offered position was suitable and conformed to the work limitations provided by Dr. Smith. It allowed appellant 30 days to accept the position or provide his reasons for refusal. The Office advised that an employee who refuses an offer of suitable work without reasonable cause is not entitled to compensation. There was no response from appellant.

On September 12, 2006 the Office terminated appellant's compensation benefits on the grounds that he refused an offer of suitable work.[1]

On June 4, 2007 appellant submitted a letter accepting the job offer. On September 5, 2007 he advised that he had returned to work on that date and requested reconsideration of the September 12, 2006 decision. Appellant stated that he did not return to work at an earlier time because he was hospitalized. A June 29, 2007 report from a psychiatrist at a Department of Veterans Affairs hospital indicated that appellant was hospitalized on August 29, 2006 and had continued in outpatient treatment. Appellant also submitted progress reports from Dr. Smith dated November 28, 2006 and January 9, February 5, May 7 and June 6, 2007 in which the physician diagnosed cervical, thoracic and lumbar strains[2] and described appellant's subjective complaints, objective findings and treatment. The January 9, 2007 report indicated that he was temporarily totally disabled for three days. A January 17, 2007 radiology report indicated that appellant had severe disc degeneration at L2-3 and a dessication of the L5-S1 disc space with a mild disc protrusion.

[1] The Board notes that the Office indicated that appellant's wage-loss compensation and entitlement to a schedule award were terminated. The record shows that appellant filed a claim for a schedule award but it appears that the issue of entitlement to a schedule award was not adjudicated prior to the September 12, 2006 termination decision.

[2] Only cervical and lumbar strains are accepted conditions in appellant's case.

By decision dated November 8, 2007, the Office denied modification of the September 12, 2006 termination decision.

Appellant requested reconsideration and submitted additional medical evidence. In a February 15, 2008 report, Dr. Smith indicated that appellant was off work from October 19, 2006 to September 5, 2007 due to "condition being accepted by [the Office]." On July 17, 2007 he diagnosed a herniated lumbar disc, thoracic strain and cervical strain. Dr. Smith provided work restrictions which included light work with no lifting over 20 pounds, no repeated or prolonged twisting, turning or uncomfortable neck positions such as desk work, driving or overhead work. By decision dated April 23, 2008, the Office denied appellant's request for reconsideration on the grounds that the evidence did not warrant further merit review of the claim.[3]

LEGAL PRECEDENT -- ISSUE 1

Section 8106(c)(2) of the Federal Employees' Compensation Act[4] states that a partially disabled employee who refuses to seek suitable work, or refuses or neglects to work after suitable work is offered to, procured by or secured for him is not entitled to compensation.[5] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when 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.[6] 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 employee was suitable.[7] 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 of record.[8]

With respect to the procedural requirements of termination under 5 U.S.C. § 8106(c)(2), the Board has held that the Office must inform the employee of the consequences of refusal to accept suitable work and allow the employee an opportunity to provide reasons for refusing the offered position.[9] If the employee presents reasons for refusing the offered position, the Office

[3] Subsequent to the April 23, 2008 Office decision, additional evidence was associated with the file. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

[4] 5 U.S.C. §§ 8101-8193.

[5] *Id.* at § 8106(c)(2).

[6] *M.L.*, 57 ECAB 746, 750 (2006); *Frank J. Sell, Jr.*, 34 ECAB 547, 552 (1983).

[7] *M.L., supra* note 6; *Albert Pineiro*, 51 ECAB 310, 312 (2000).

[8] *Stephen A. Pasquale*, 57 ECAB 396, 402 (2006); *see also Camillo R. DeArcangelis*, 42 ECAB 941, 943 (1991).

[9] *Alfred Gomez*, 53 ECAB 149, 150 (2001); *see Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818, 824 (1992).

must inform the employee if it finds the reasons inadequate to justify the refusal of the offered position and afford the employee a final opportunity to accept the position.[10]

ANALYSIS -- ISSUE 1

On August 4, 2006 the employing establishment offered appellant a position as a modified custodial laborer for eight hours a day based on the work restrictions provided by Dr. Smith on March 16, 2006. The job description indicated that sitting, walking and standing were limited to two hours, reaching and reaching above the shoulder was limited, there was no pushing or pulling above shoulder level and there was no twisting, bending, stooping, squatting or climbing. On August 9, 2006 the Office advised appellant that the offered position was suitable and conformed to the work limitations provided by Dr. Smith. It allowed appellant 30 days to accept the position or provide his reasons for refusal. The Office advised that an employee who refuses an offer of suitable work without reasonable cause is not entitled to compensation. There was no response from appellant. Appellant did not accept the position and provided no reasons for refusing the position. On September 12, 2006 the Office properly terminated his compensation benefits on the grounds that he refused an offer of suitable work based on the record as of that time.

Where the Office shows that an offered limited-duty position was suitable based on the claimant's work restrictions at that time, the burden shifts to the claimant to show that his or her refusal to work in that position was justified.[11] Office procedures also provide that, if it is not possible to determine whether a claimant's reason for refusal is justified without further investigation of the issues, the claims examiner should contact the claimant for clarifying information.[12]

The Board finds that the case is not in posture for decision. With his request for reconsideration appellant submitted a report indicating that he was hospitalized for psychiatric treatment between August 9, 2006, the date the Office informed appellant that he had been offered a suitable work position, which he had 30 days to accept, and September 12, 2006, the date the Office terminated appellant's compensation benefits. While this report was vague as to the actual length of appellant's hospitalization, the Office, instead of seeking clarification of this report, dismissed the report on the grounds that such hospitalization was not related to an employment-related condition. Office procedures note that, if medical reports in the record document a condition which has arisen since the compensable injury, and this condition disables the claimant from the offered job, the job will be considered unsuitable, even if the subsequently acquired condition is not work related.[13] Consequently, the evidence requires further

[10] *Id.*

[11] *Kathy E. Murray*, 55 ECAB 288, 290 (2004).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-earning Capacity*, Chapter 2.814.5(d) (December 1993).

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

development by the Office on whether the Office's termination of appellant's compensation based on his refusal of suitable work should be modified.[14]

CONCLUSION

The Board finds that the Office improperly denied modification of the prior decision dated September 12, 2006 terminating appellant's compensation benefits for refusal of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 23, 2008 and November 8, 2007 are set aside and the case is remanded for further development consistent with the decision.

Issued: May 15, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[14] Given the resolution of the first issue, the second issue is moot.