United States Department of Labor
Employees' Compensation Appeals Board

R.B., Appellant	)	
and	)	**Docket No. 08-2154**
	)	**Issued: May 8, 2009**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Atlanta, GA, Employer	)	

Appearances:
Martin Kaplan, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 31, 2008 appellant, through his attorney, filed a timely appeal from October 4, 2007 and April 24, 2008 merit decisions of the Office of Workers' Compensation Programs terminating his compensation for refusing suitable work. 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 under 5 U.S.C. § 8106(c) on the grounds that he refused an offer of suitable work.

FACTUAL HISTORY

On June 6, 2006 appellant, then a 45-year-old transportation security screener, filed a claim for an injury to his right eye occurring on May 30, 2006 when a fan blew sand that had

spilled from a bag into his face. The Office accepted the claim for photophobia of the right eye. Appellant stopped work on May 31, 2006 and received compensation for total disability.[1]

In a report dated May 8, 2007, Dr. Izak F. Wessels, a Board-certified ophthalmologist, related that appellant could return to light-duty work with restrictions against use of the right eye and the requirement that he wear an eye patch.

On May 9, 2007 the employing establishment offered appellant a light-duty position beginning May 9, 2007 as a screener with restrictions against use of his right eye.

In a note dated May 24, 2007, Dr. Wessels asserted that appellant "cannot legally drive due to visual field loss and severe photophobia."

By letter dated May 31, 2007, the employing establishment noted that appellant related that he could not drive and had submitted a physician's note documenting his inability to drive. The employing establishment maintained that it was his "responsibility to provide his own transportation to work."

On June 8, 2007 the Office informed the employing establishment that its May 9, 2007 job offer was not valid because it did not include "the salary amount and location of the job."

In a work restriction evaluation dated June 14, 2007, Dr. Wessels found that appellant could perform both his usual job and that, if unable to perform his usual job, he could work eight hours per day with restrictions due to "severe disabling photophobia." He further indicated that he was unable to state the number of hours that appellant could work pending a diagnosis. Dr. Wessels found that he had no limitation in performing any activity except as a result of his severe photophobia. He determined that appellant could sit, walk and stand for six to eight hours daily and listed no other specific limitations.

On June 26, 2007 the employing establishment offered appellant a full-time limited-duty position in screening with restrictions on using his right eye and the requirement that he wear an eye patch. Appellant rejected the position, citing his inability to drive.

On July 18, 2007 the Office notified appellant that the limited-duty position offered by the employing establishment was suitable and that his reason for refusing the position was not acceptable. It advised him of the provisions of 5 U.S.C. § 8106(c)(2) governing the refusal of suitable employment and afforded him an additional 30 days to accept the position.

By letter dated August 21, 2007, the Office informed appellant that it had considered his reasons for refusing the position and determined that they were invalid. It provided him 15 days to accept the position or have his compensation terminated.

By decision dated October 4, 2007, the Office terminated appellant's compensation on the grounds that he refused an offer of suitable work under section 8106(c)(2). It based its

[1] Appellant returned to limited-duty employment on September 6, 2006 but stopped work again on September 7, 2006.

finding that he was capable of performing the offered position on Dr. Wessels' June 14, 2007 work restriction evaluation.

On October 17, 2007 appellant requested either a telephonic oral hearing or review of the written record.

In a report dated November 8, 2007, Dr. David A. Rankine, a Board-certified neurologist, diagnosed a corneal abrasion. On December 31, 2007 Dr. Wessels found that appellant could resume work without restrictions. On January 21, 2008 he indicated that appellant had increased "visual disability" and was therefore unable "to perform normal activities, including working." On February 6, 2008 the Office accepted "other disorder" of the right optic nerve.

In a report dated February 25, 2008, Dr. Wessels diagnosed right and left severe ptosis and photophobia. He stated, "Because of his severe visual disability and photophobia it is not possible for him to function within a usual illumination climate. I believe that his ocular discomfort also will materially interfere with his ability to function in a reasonable and appropriate manner with possible combative clients."

On February 27, 2008 appellant requested a review of the written record in lieu of a telephonic hearing. On April 3, 2008 the Office accepted right eye dermatoses as causally related to his work injury. On April 9, 2008 it accepted chronic pain syndrome of the right optic nerve.

By decision dated April 24, 2008, the hearing representative affirmed the October 4, 2007 decision after finding that it was appropriate at the time of issuance. She found, however, that the evidence was currently sufficient to warrant further development of the case record and instructed the Office upon return of the case record to refer appellant for a second opinion evaluation.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[2] Section 8106(c)(2) of the Federal Employees' Compensation Act[3] 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.[4] To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[5] Section 8106(c) will be narrowly construed as it serves as a penalty provision,

[2] *Linda D. Guerrero*, 54 ECAB 556 (2003).

[3] 5 U.S.C. §§ 8101-8193.

[4] *Id*. at § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

[5] *Ronald M. Jones*, 52 ECAB 190 (2000).

which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[6]

Section 10.517(a) of the Act's implementing regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured by the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.[7] Pursuant to section 10.516, the employee shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.[8]

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, establishing that a position has been offered within the employee's work restrictions and setting for the specific job requirements of the position.[9] In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, it has the burden of showing that the work offered to and refused by appellant was suitable.[10]

Once the Office establishes that the work offered is suitable, the burden shifts to the employee who refuses to work to show that the refusal or failure to work was reasonable or justified.[11] The determination of whether an employee is physically capable of performing a modified assignment is a medical question that must be resolved by medical evidence.[12] Office procedures state that acceptable reasons for refusing an offered position include medical evidence of inability to do the work.[13]

ANALYSIS

The Office accepted that appellant sustained right eye photophobia and dermatomes and chronic pain syndrome of the right optic nerve as a result of sand blowing into his face on May 30, 2006. It paid him compensation for total disability until October 4, 2007, when it terminated his compensation for refusing suitable work.

The Board finds that the Office improperly terminated appellant's compensation as the medical evidence failed to establish that he was capable of performing the position offered by the employing establishment. In determining that the full-time limited-duty position in screening

[6] *Joan F. Burke*, 54 ECAB 406 (2003).

[7] 20 C.F.R. § 10.517(a); *see Ronald M. Jones, supra* note 5.

[8] *Id*. at § 10.516.

[9] *See Linda Hilton*, 52 ECAB 476 (2001).

[10] *Id*.

[11] 20 C.F.R. § 10.517(a).

[12] *Gayle Harris*, 52 ECAB 319 (2001).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(3) (July 1997).

offered by the employing establishment was suitable, the Office relied upon the opinion of his attending physician, Dr. Wessels.

In a report dated May 8, 2007, Dr. Wessels found that appellant could work if he did not use his right eye and wore an eye patch. In a work restriction evaluation dated June 14, 2007, he opined both that he could perform his usual position and that he could work full time with restrictions. Dr. Wessels determined that appellant could sit, walk and stand for six to eight hours per day and had no physical limitations except for those resulting from his photophobia. He, however, characterized the photophobia as severe and disabling. Dr. Wessels further indicated on the work restriction evaluation that he was unable to specifically state the number of hours that appellant could work pending a diagnosis. As his opinion is equivocal in nature, it is insufficient to meet the Office's burden of proof to establish that appellant could perform the duties of the offered position.[14]

Additionally, on June 26, 2007 appellant refused the limited-duty position in screening as he was unable to drive due to his work injury. On May 24, 2007 Dr. Wessels asserted that he was unable to "legally drive due to visual field loss and severe photophobia." Under the Office's procedure and Board precedent, an inability to travel to work because of residuals of the employment injury is an acceptable reason for rejecting an offer of suitable work.[15]

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation on the grounds that he refused an offer of suitable work.

[14] *See Ricky S. Storms*, 52 ECAB 349 (2001).

[15] *Supra* note 13 at Chapter 2.814.5(a)(5) (July 1996); *Mary E. Woodard*, 57 ECAB 211 (2005); *Janice S. Hodges*, 52 ECAB 379 (2001).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 24, 2008 and October 4, 2007 are reversed.

Issued: May 8, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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