United States Department of Labor
Employees' Compensation Appeals Board

S.E., Appellant	)	
and	)	**Docket No. 10-1167**
	)	**Issued: April 25, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Mobile, AL, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On March 24, 2010 appellant filed an appeal from a February 18, 2010 decision of an Office of Workers' Compensation Programs' hearing representative, who affirmed the termination of his wage-loss compensation on the grounds that he refused an offer of suitable work. Pursuant to the Federal Employees' Compensation Act[1] and 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 July 28, 2009 pursuant to 5 U.S.C. § 8106(c).

On appeal his attorney asserts that the decision is contrary to fact and law.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On August 18, 1999 appellant, then a 35-year-old flat sorter machine clerk, sustained a right shoulder strain while pulling mail tubs off a conveyor belt. He underwent authorized shoulder surgery on December 2, 1999 and March 23, 2000, and returned to work with no limitations on June 5, 2000. Under separate claims, the Office accepted traumatic arthritis of both knees, localized primary arthritis of the right lower leg, and a medial meniscal tear of the left knee. Appellant received intermittent wage-loss compensation under the knee claims. In June 2006, he was placed on the periodic compensation rolls.

On October 31, 2008 Dr. Andre J. Fontana, a Board-certified orthopedic surgeon, performed authorized arthroscopic surgery for a right rotator cuff tear. On January 6, 2009 he advised that appellant could return to work with no use of the right arm and should follow old work restrictions. The employing establishment prepared a modified sales, service, distribution associate assignment, and offered it to appellant on January 7, 2009 and asked that Dr. Fontana review it. Appellant refused the offered position, stating that it would violate his work limitations. On January 15, 2009 Dr. Fontana advised that the January 7, 2009 job offer was suitable for appellant.

By letter dated February 4, 2009, the Office advised appellant that the modified job was suitable. Appellant was notified that, if he failed to report to work or failed to demonstrate that the failure was justified, his right to compensation for wage loss or a schedule award would be terminated pursuant to section 8106(c)(2) of the Act. He was given 30 days to respond.

In a January 27, 2009 letter, received on February 5, 2009, Dr. Fontana advised that certain aspects of the offered position were not suitable. He repeated his restrictions. A telephone conference was held on February 20, 2009 with appellant, employing establishment personnel and an Office claims examiner participating. It was noted that the old work restrictions provided by Dr. Fontana pertained to appellant's knee injury under file number xxxxxx834. Appellant's objections to the offered position were discussed.

In a work capacity evaluation dated March 9, 2009, Dr. Fontana advised that appellant could work eight hours a day but could not use his right arm. On March 24, 2009 the employing establishment offered appellant a modified position.[2]

In a March 23, 2009 work capacity evaluation, received by the Office on March 30, 2009 Dr. Fontana provided updated restrictions limiting appellant's walking and standing to 20 minutes total a day, reaching restricted to 8 hours, with no reaching above shoulder, bending, stooping, pushing, pulling, kneeling or climbing, and lifting restricted to 25 pounds. Appellant refused the offered position, stating that it would violate his physical restrictions.

[2] The position as a sales/service distribution associate was from 9:00 a.m. to 6:00 p.m. daily, with window service duties using a stool for 5 to 6 hours, clearing accountable mail for 0.5 to 1 hour, writing second notices using a stool for 0.5 to 1 hour, and processing UBBM for 1 to 2 hours. The physical requirements were described as primarily sitting, with standing and walking seldom, for eight hours, lifting up to 25 pounds for six to eight hours, and grasping and fine manipulation and reaching up to shoulder level for seven to eight hours.

On May 4, 2009 the Office again advised appellant that the modified job was suitable. Appellant was notified that, if he failed to report to work or failed to demonstrate that the failure was justified, his right to compensation for wage loss or a schedule award would be terminated pursuant to section 8106(c)(2) of the Act, and he was given 30 days to respond. He rejected the job offer, contending that it violated his 20-minute restriction on standing. By letter dated June 15, 2009, the Office advised appellant that his reasons for refusing to accept the offered position were insufficient and that he had an additional 15 days to accept the job offer. On June 22, 2009 appellant again stated that working at the window would violate his restrictions. He did not return to work.

By decision dated July 28, 2009, the Office found that the weight of the medical evidence rested with the opinion of Dr. Fontana. It terminated appellant's wage-loss compensation on the grounds that he refused an offer of suitable work.

On August 3, 2009 appellant requested a hearing, stating that the Office did not find that the offered position was suitable regarding his knee restrictions. At the November 9, 2009 hearing he testified that he has not worked since July 2007. Appellant described a new knee injury that occurred on June 14, 2009, adjudicated under file number xxxxxx400. Dr. Fontana placed him off work on June 16, 2009 and an August 2009 magnetic resonance imaging (MRI) scan showed a meniscal tear. Appellant was to have additional authorized knee surgery on November 17, 2009. Prior to the fall of June 14, 2009, he could not perform the window duties of the offered position because it would exceed the 20-minute restriction on standing and walking. Appellant's attorney argued that the June 14, 2009 fall constituted a new injury and the Office should have made a new determination as to whether the offered position was suitable. In a December 4, 2009 letter, the employing establishment affirmed that the position was suitable when offered.

By decision dated February 18, 2010, an Office hearing representative affirmed, in part, and reversed, in part, the July 28, 2009 decision. The hearing representative found that the offered position was suitable as to appellant's shoulder injury under the instant claim; but the Office did not make any determination whether the offered position was also suitable under file numbers xxxxxx834 and xxxxxx400, the accepted claims for knee injuries for which appellant was receiving wage-loss compensation.

LEGAL PRECEDENT

Section 8106(c) of the Act provides in pertinent part, "A partially disabled employee who … (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[3] It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[4] The implementing regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee 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

[3] 5 U.S.C. § 8106(c).

[4] *Joyce M. Doll*, 53 ECAB 790 (2002).

showing before entitlement to compensation is terminated.[5] 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.[6] In determining what constitutes "suitable work" for a particular disabled employee, it considers 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.[7] Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.[8] Section 8106(c) will be narrowly construed as it serves as a penalty provision which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[9]

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] It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.[11]

ANALYSIS

The Board finds that the Office failed to meet its burden of proof to terminate appellant's wage-loss compensation under section 8106(c). It is well established that before benefits can be terminated under this section, the Office has to demonstrate the employee has the physical capacity to perform the duties of the position offered.[12] The evidence of record does not establish that the Office properly considered appellant's accepted claims for traumatic arthritis to both knees or the prior surgeries on appellant's capacity to perform modified work.

The position offered appellant in March 2009 was not based on full consideration of the physical restrictions relevant to the preexisting knee conditions. Dr. Fontana did not review this job offer, and the job duties required sitting on a stool at a postal window for five to six hours. In a March 23, 2009 work capacity evaluation, he restricted appellant to a daily total of 20 minutes walking and 20 minutes standing. Appellant also informed the Office of a new knee injury on July 2, 2009, prior to the July 28, 2009 decision. He submitted a report from

[5] 20 C.F.R. § 10.517(a).

[6] *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[7] 20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB 681 (2004).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5.a(1) (July 1997); *see Lorraine C. Hall*, 51 ECAB 477 (2000).

[9] *Gloria G. Godfrey*, 52 ECAB 486 (2001).

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

[11] *Richard P. Cortes*, 56 ECAB 200 (2004).

[12] *See Sharon L. Dean*, 56 ECAB 175 (2004).

Dr. Fontana who reported on the fall and advised that appellant should not work. As of the date the Office terminated monetary compensation, it did so without consideration of the preexisting conditions in the evaluation of suitability of the offered position.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's monetary compensation on the grounds that he refused an offer of suitable employment under section 8106(c)(2).[13]

ORDER

IT IS HEREBY ORDERED THAT the February 18, 2010 decision of the Office of Workers' Compensation Programs be reversed.

Issued: April 25, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[13] 5 U.S.C. § 8106(c)(2); *see R.B.*, Docket No. 08-2154 (issued May 8, 2009).