United States Department of Labor
Employees' Compensation Appeals Board

JUSTIN R. WAGNER, Appellant	)	
and	)	**Docket No. 04-99**
	)	**Issued: June 1, 2004**
DEPARTMENT OF AGRICULTURE, TYSONS FOOD INCORPORATED, Green Forest, AZ, Employer	)	

Appearances:
Justin R. Wagner, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On October 17, 2003 appellant filed a timely appeal of a July 21, 2003 decision of the Office of Workers' Compensation Programs. Under 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 on the grounds that he abandoned suitable work.

FACTUAL HISTORY

On August 13, 2001 appellant, then a 27-year-old food inspector (slaughter), reached over his head to the left to shut off the inspection line when his left shoulder popped. Appellant received medical attention the same day and has not returned to work. The Office accepted appellant's claim for a left shoulder impingement.

On November 6, 2001 the Office assigned a rehabilitation nurse to facilitate in appellant's recovery and return to full regular-duty employment. On November 27, 2001 Dr. John Park, a Board-certified orthopedic surgeon, performed a left shoulder posterior gleno-labral reconstruction surgery. On March 19, 2002 Dr. Park performed a diagnostic arthroscopy surgery. Continued posterior instability of the left shoulder was noted, but the physician could not proceed from arthroscopy to surgery due to the amount of swelling. On May 7, 2002 Dr. Park performed a second left shoulder posterior gleno-labral reconstruction surgery. Appellant underwent extensive physical therapy before and after his surgical procedures and received appropriate compensation for all periods of total disability.

Dr. Park released appellant to one arm duty (right arm) on July 15, 2002. The light duty was described as either doing one arm duty with his right arm at his former job or engaging in a job were the arms could be held close to body such as answering a telephone, computer work and handwriting. However, the employing establishment was unable to accommodate such restrictions.

In a November 11, 2002 report, Dr. Park advised appellant could return to work on November 18, 2002 with the following restrictions on his left arm: no repetitive movements, no lifting greater than 20 pounds or 90 degrees, no greater than occasionally lifting 50 pounds with both arms[1] or 90 degrees.

On November 13, 2002 the employing establishment offered appellant the position of food inspector, slaughter in the poultry plant with restrictions of no repetitive movements greater than 20 pounds or 90 degrees with the left arm, occasional 50 pounds with both arms or at 90 degrees.

In a November 15, 2002 report, Dr. Park advised that appellant's restrictions were no repetitive work from 0 to 90 degrees with his arm/shoulder, occasional lifting greater than 20 pounds or greater than 90 degrees with left arm and no lifting more than 90 degrees or more than 50 pounds with both arms.

On November 19, 2002 the Office received a handwritten note from the employing establishment on a copy of Dr. Park's November 15, 2002 report advising that it could not accommodate the restriction of no repetitive reaching from 0 to 90 degrees.

In a December 23, 2002 letter, the employing establishment advised that appellant had denied the offered job stating that it was not within his physical restrictions.

On January 21, 2003 Dr. Park reviewed the physical requirements of a poultry inspector, which were listed as lifting of 0 to 5 pounds; no squatting, crawling, crouching or kneeling; occasional bending and stooping; less than 10 minutes occasional balancing and climbing stairs; fine manipulation; frequent bilateral use of fingers; frequent simple grasping and frequent firm hand grasping. The physician wrote in the margin "all of these are okay."

[1] Although Dr. Parks specifically referenced hands, the restrictions on movement refer to appellant's left arm.

In a February 6, 2003 letter, the Office informed appellant that the November 13, 2002[2] offered position of poultry inspector had been found to be suitable to his work capabilities. The Office noted that, although appellant had originally declined the position, his physician had confirmed that he was capable of performing the duties of the offered position and such position remained available to him. The Office stated that appellant had 30 days to either accept the position and return to work or give his reasons for refusing it. The Office indicated that, if he failed to accept the position, any explanation or evidence, which he provided would be considered prior to determining whether his reasons for refusing the job were justified. The Office additionally warned appellant of the consequences of refusing suitable work without justification.

In a February 10, 2003 letter, the employing establishment reoffered appellant the position of food inspector slaughter (poultry). It noted that the position was consistent with Dr. Park's November 13, 2002 report and contained no repetitive movement greater than 20 pounds or 90 degrees with left arm, occasional 50 pounds with both arms or at 90 degrees.[3] The physical requirements for the position were noted to include a 0- to 5-pound lifting requirement.

In a March 3, 2003 letter, appellant stated that Dr. Park had continually indicated that there was to be no repetitive movement of the left arm and shoulder area in the 0 to 90 degree range. He stated that the offered job misquoted or did not understand Dr. Park's orders concerning repetitive movement and noted that some correspondence between the field nurse and Dr. Park's nurse concerning a clarification of his capabilities. He further stated that the functional requirements of the job of food inspector require moderate lifting and carrying of 15 to 44 pounds, repetitive motion of upper body and limbs (6 hours), reaching above head and the use of both hands, which are not allowed under Dr. Park's restrictions. A copy of the position requirements of a veterinary medical officer/food inspector and a copy of an article entitled "Traditional Postmortem Line Inspection Techniques for Young Chickens" were attached.

In an April 1, 2003 letter, the Office informed appellant that it had reviewed his reasons for refusing the offered modified position and found them unacceptable. The Office gave him 15 days to return to work or accept the position in writing. The Office warned appellant that, if he continued to refuse the position, it would proceed with a final decision.

In an April 14, 2003 letter, appellant advised that, after receiving the Office's April 1, 2003 letter, he contacted his employing establishment and inquired as to whether his position had been modified to accommodate his permanent restrictions and was informed on April 14, 2003 by Dr. Paul Resweber, district manager and Crystal Gagnon, Personnel Operations Branch, that there had been no modifications and that modifications could not be made to the job to accommodate the restrictions of: no repetitive movement, no greater than 20 pounds or

[2] The Board notes that, although the Office had referenced a November 18, 2002 position, this is a typographical error. The Board notes that the date of November 18, 2002, refers to the date Dr. Park advised appellant could return to work.

[3] *Id.*

90 degrees, occasional 50 pounds with both hands or 90 degrees of the left arm. Accordingly, appellant advised that he was again declining the position.

On April 21, 2003 appellant returned to work. He stopped work and was seen in the emergency room for shoulder pain. The emergency room physician advised appellant to see Dr. Park as soon as possible and not to return to work until he was released by Dr. Park to do so.

In a May 20, 2003 report, Dr. William K. Flake, a Board-certified general surgeon, diagnosed a cystic mass on appellant's left shoulder, which appeared somewhat fixed to the muscle. Surgery to excise the mass on the left shoulder was planned.

On July 21, 2003 the Office received an undated prescription note from Mercy St. John's Carroll Regional Medical Center containing an illegible signature, which requested that appellant be excused from work June 11 through July 15, 2003 due to "bad surgery."

In a July 21, 2003 decision, the Office terminated appellant's compensation for abandoning suitable work. The Office noted that the employing establishment verified on April 22, 2003, that appellant's refusal of the offered position continued and the position remained available. The Office further advised that wage loss and schedule award benefits were also terminated because appellant failed to accept suitable employment.

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees' Compensation Act states: "a partially disabled employee who: (1) refused to seek suitable work; or (2) refuses or neglects to work after suitable work is offered is not entitled to compensation."[4] An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[5] 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.[6]

ANALYSIS

In this case, appellant returned to work on April 21, 2003 and stopped work the same day. The Office terminated appellant's compensation on the grounds that he neglected to work after suitable work was procured under section 8106(c).

Before the Board determines whether appellant abandoned suitable work, it must first determine whether the work offered by the employing establishment and approved by the Office was suitable.

[4] 5 U.S.C. § 8106(c)(2).

[5] 20 C.F.R. § 10.517.

[6] *Gloria J. Godfrey*, 52 ECAB 486 (2001).

In this case, appellant was offered a position of food inspector slaughter (poultry), which was noted to contain "no repetitive movement greater than 20 pounds or 90 degrees with left arm, occasional 50 pounds with both arms or at 90 degrees," and included a lifting requirement of up to 5 pounds. Although Dr. Park found in his January 21, 2003 report that appellant could lift up to 5 pounds, the Board notes that the physician specifically indicated, in his November 15, 2002 report, that appellant was restricted from performing repetitive work from 0 to 90 degrees with his left arm/shoulder.[7] The offered position advised only that appellant would not be performing repetitive work greater than 20 pounds or greater than 90 degrees with the left arm and failed to account for the fact that appellant could not perform any repetitive work from 0 to 90 degrees with his left arm/shoulder regardless of the amount he is able to lift. The physical requirements of the position of food inspector slaughter (poultry) failed to encompass and incorporate all of Dr. Park's work restrictions.[8]

The medical evidence, therefore, shows that the job offered to appellant, which he returned to on April 21, 2003 and subsequently stopped due to shoulder pain, failed to encompass and incorporate the work restrictions as set forth by Dr. Park at the time it was offered and, as a result, was unsuitable employment. The Office has, therefore, failed to show that appellant abandoned suitable employment.[9]

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation on the grounds that he abandoned suitable work.

[7] The record reflects that appellant was evaluated for left hand numbness on September 11, 2002 by Dr. Michael W. Morse, a Board-certified neurosurgeon, who opined that appellant had symptoms of carpal tunnel syndrome. He further opined that the nerve was not damaged during surgery as appellant's symptoms were not constant. Dr. Morse noted that a September 16, 2002 magnetic resonance imaging (MRI) scan of appellant's spine was unremarkable and within normal limits. An October 17, 2002 MRI scan of the left brachial plexus revealed no mass or signal abnormality, no adenopathy and no soft tissue mass demonstrated on the neck or upper thorax.

[8] The Board notes that the employing establishment had previously indicated that it could not accommodate the restriction of no repetitive reaching from 0 to 90 degrees.

[9] The Board further notes that the Office's decision finding that appellant abandoned suitable work is procedurally deficient. Before terminating benefits, the Office did not advise appellant, after he stopped work on April 21, 2003, that the position remained available and did not provide him a final opportunity of a 15-day period in which to return to work before terminating benefits. *See Mary G. Allen*, 50 ECAB 103, 106 (1998); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.10(e)(1) (July 1996).

ORDER

IT IS HEREBY ORDERED THAT the July 21, 2003 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 1, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member