United States Department of Labor
Employees' Compensation Appeals Board

TROY COLEMAN, Appellant	)	
and	)	**Docket No. 04-1560**
	)	**Issued: January 27, 2005**
DEPARTMENT OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION, Pikeville, KY, Employer	)	

Appearances:
John E. Hunt, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On May 27, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated December 31, 2003 affirming the November 22, 2002 termination of his compensation for refusal to accept suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.[1]

ISSUE

The issue is whether the Office properly terminated appellant's compensation effective November 22, 2002 on the grounds that he refused an offer of suitable work.

[1] The record contains a November 14, 2003 decision approving a fee request by appellant's attorney. Appellant did not appeal this decision to the Board.

FACTUAL HISTORY

On April 28, 1992 appellant, then a 61-year-old coal mine inspector, sustained an injury when he hit his head on a roof bolt at work. The Office accepted that he sustained a head contusion, cervical strain and aggravation of cervical degenerative disc disease. Appellant stopped work on May 6, 1992 and received compensation for total disability.[2]

In September 1998 the Office referred appellant to Joseph H. Rapier, a Board-certified orthopedic surgeon, for an examination and opinion regarding whether he continued to have residuals of his April 28, 1992 employment injury. In a report dated October 13, 1998, Dr. Rapier reported the findings on examination and diagnostic testing and diagnosed cervical strain aggravating preexisting dormant degenerative disc disease without radiculopathy and lumbar strain aggravating preexisting dormant degenerative disc disease without radiculopathy. In response to a question posed by the Office, at the time of the referral, he indicated that appellant did not have an employment-related condition which would require continued treatment. Dr. Rapier stated that appellant could lift up to 10 pounds but should limit bending, twisting and prolonged sitting, standing and walking.

Appellant received treatment for his condition from Dr. William G. Wheeler, an attending Board-certified orthopedic surgeon. In a report dated April 10, 2000 and an undated note, Dr. Wheeler indicated that appellant had significant degenerative disc disease of the lumbar and cervical spines. He stated that these conditions as well as inactivity caused by his overall medical condition prevented him from returning to gainful employment.[3]

In August 2000 the Office referred appellant and the case record to Dr. Mumtaz Malik, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion regarding his ability to work.[4] In a report dated August 31, 2000, Dr. Malik stated that appellant exhibited limited neck and back movement on examination and diagnosed resolved cervical disc herniation with post-traumatic degenerative arthritis of the cervical spine. He indicated that appellant could perform the duties of the mine safety health specialist position offered by the employing establishment, but noted that his statement did not consider any medical problems appellant might have other than his cervical condition.

In August 2002 the employing establishment offered appellant a position as a mine inspection assistant in Denver, Colorado. The position required lifting up to five pounds and limited sitting, standing and walking. The employing establishment indicated that Office

[2] Appellant resided in Kimper, Kentucky at the time he filed his claim and later moved to Nancy in the central southern part of Kentucky. He currently lives in Stanville, Kentucky which is approximately 30 miles west of Kimper. Appellant's former work site in Pikeville is approximately half way between Kimper and Stanville. Appellant was terminated from the employing establishment when he retired on April 1, 1993.

[3] Dr. Wheeler also specifically indicated that appellant could not perform the mine safety health specialist position.

[4] The Office determined that there was a conflict in the medical evidence regarding this issue between Dr. Rapier and Dr. Wheeler.

regulations provided for relocation expenses and that the payment of such expenses would be coordinated once appellant accepted the position.

By letter dated October 9, 2002, the Office advised appellant of its determination that the mine inspection assistant position offered by the employing establishment was suitable. The Office notified appellant of the provisions of 5 U.S.C. § 8106(c) and advised him that he had 30 days either to accept the offer or to provide a reasonable, acceptable explanation for refusing it.

Appellant declined the mine inspection assistant position on September 9, 2002, indicating that his medical condition prevented him from performing the position, that he did not have the necessary skills, and that he did not wish to relocate from his home in Nancy, Kentucky.

By decision dated November 22, 2002, the Office terminated appellant's compensation effective that date on the grounds that he refused an offer of suitable work. The Office indicated that the employing establishment offered to arrange for the payment of relocation expenses and stated that appellant's desire not to relocate had "no probative value."

Appellant requested a hearing before an Office hearing representative which was held on September 23, 2003.

By decision dated and finalized December 31, 2003, the Office hearing representative affirmed the Office's November 22, 2002 decision.

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees' Compensation Act 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 her 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 it is 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 appellant was suitable.[7]

If possible, the employer should offer suitable reemployment in the location where the employee currently resides. If this is not practical, the employer may offer suitable reemployment at the employee's former-duty station or other location.[8]

[5] 5 U.S.C. § 8106(c)(2).

[6] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

[7] *Glen L. Sinclair*, 36 ECAB 664 (1985).

[8] 20 C.F.R. § 10.508 (1999).

ANALYSIS

This case presents several apparent issues, including the scope of appellant's work restrictions; whether the mine inspection assistant position in Denver, Colorado offered by the employing establishment satisfied that work restriction; and whether appellant had the vocational skills to perform the duties of the position. But the overarching issue, the one that takes precedence over all the issues just mentioned, is whether suitable reemployment was possible or practical in or around Nancy, Kentucky, the location where appellant resided at the time of the job offer. By regulation, when an employee would need to move to accept an offer of reemployment, the employing establishment should, if possible, offer suitable reemployment in the location where the employee resided at the time of the job offer. The record contains no evidence that the employing establishment made any effort to determine whether such reemployment was possible. The Office should have developed this aspect of the case before finding that the offer was suitable.

In 1987 the pertinent regulation applied only to former employees, employees who were terminated from the agency's employment rolls:

> "Where an injured employee relocates after having been terminated from the agency's employment rolls, the Office encourages employing agencies to offer suitable reemployment in the location where the former employee currently resides. If this is not practical, the agency may offer suitable employment at the employee's former-duty station or other alternate location."[9]

The regulation in effect since 1999 contains no such restrictive language.[10] The regulation now states that employing establishments "should" offer suitable reemployment where the employee currently resides, if possible. Under the circumstances of this case, where appellant would need to move to accept a position in Denver, Colorado, the employing establishment should have offered suitable reemployment in or around Nancy, Kentucky, if possible. It was error for the Office to terminate appellant's compensation benefits without positive evidence showing that such an offer was not possible or practical.[11]

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation effective November 22, 2002 on the grounds that he refused an offer of suitable work.

[9] 20 C.F.R. § 10.123(f) (1987).

[10] *See supra* text accompanying note 9.

[11] *See Martin Joseph Ryan*, Docket No. 00-1262 (issued June 14, 2002) (holding that it was proper for the employer to offer a job in New York where the record contained evidence showing that the employer had first attempted to assess the practicality of offering suitable reemployment in Clearwater, Florida, the location where the claimant resided).

ORDER

IT IS HEREBY ORDERED THAT the December 31, 2003 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 27, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member