

**United States Department of Labor
Employees' Compensation Appeals Board**

SOLOMON R. LEE, Appellant

and

**DEPARTMENT OF THE ARMY, Fort Lee, VA,
Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 05-235
Issued: May 5, 2005**

Appearances:
Solomon R. Lee, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member

JURISDICTION

On October 29, 2004 appellant filed a timely appeal of a June 21, 2004 decision of the Office of Workers' Compensation Programs, terminating his compensation on the grounds that he refused an offer of 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 met its burden of proof to terminate compensation pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

The case has been before the Board on prior appeals. In a decision dated August 20, 1997, the Board found that the Office did not meet its burden of proof to reduce appellant's compensation on the grounds that his wage-earning capacity was represented by the selected position of package handler. By decision dated June 24, 2003, the Board remanded the case with respect to a request for a review of the written record. The Board indicated that the record

transmitted to the Board did not contain an envelope with a postmark establishing the timeliness of the request and the date of the request for a review of the written record was timely regarding a January 24, 2002 termination for refusal of suitable work decision. The history of the case is contained in the Board's decision and is incorporated herein by reference. By decision dated September 10, 2003, the Office found that the postmarked envelope was now in the record and showed that the request for a review of the written record was untimely. The Office denied the request as untimely and on the grounds that the issue could be addressed by requesting reconsideration.

On appeal the Board held that the evidence did establish that the request for a review of the written record was untimely. The Board noted that the Office had not issued a merit decision to protect appellant's appeal rights and remanded the case for a decision on the merits of the claim.

By decision dated June 21, 2004, the Office terminated appellant's compensation effective June 13, 2004, on the grounds that he refused an offer of suitable work.

LEGAL PRECEDENT

5 U.S.C. § 8106(c) 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." 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.¹ To justify such a termination, the Office must show that the work offered was suitable.² 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.³

With respect to the procedural requirements of termination under section 8106(c), the Board has held that the Office must inform appellant of the consequences of refusal to accept suitable work and allow appellant an opportunity to provide reasons for refusing the offered position.⁴ If he presents reasons for refusing the offered position, the Office must inform the employee if it finds the reasons inadequate to justify the refusal of the offered position and afford him a final opportunity to accept the position.⁵

ANALYSIS

The job offer in this case was made on September 26, 2001 for an inventory clerk in a temporary position of 120 days. The employing establishment indicated that appellant was a

¹ *Henry P. Gilmore*, 46 ECAB 709 (1995).

² *John E. Lemker*, 45 ECAB 258 (1993).

³ *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.517(a).

⁴ *Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).

⁵ *Id.*

temporary employee when injured on August 16, 1994. A temporary job offer is appropriate for a suitable work determination when the injured employee was a temporary employee at the time of injury.⁶

With respect to the physical requirements of the position, the job was a light-duty position that involved walking and standing, with no lifting, bending, stooping or strenuous reaching. The position involved performing an inventory of equipment and transcribing information. The job offer noted the second opinion physician's requirements and stated that the job was at four hours per day for the first two weeks, increasing to six hours per day for the next two weeks and eight hours per day thereafter. This is in accord with the work restrictions provided by the second opinion referral physician, Dr. Baljit Sidhu, a Board-certified orthopedic surgeon, in his July 18, 2000 report. He diagnosed a herniated disc at L5-S1, stating that on present examination appellant did not have objective findings to support significant pressure on the nerve root. He indicated that appellant should begin at four hours per day for the first couple of weeks and then gradually increase to eight hours. Dr. Sidhu completed a work capacity evaluation (Form OWCP-5c) with a 40-pound lifting restriction, 30 pounds of pushing, 25 pounds of pulling, 6 hours of sitting, 1 to 2 hours of walking, standing and reaching above shoulder.

The Board finds that the September 26, 2001 job offer was made with regard to the physical restrictions provided by Dr. Sidhu and was medically suitable. The inventory clerk position was a light-duty position that did not involve lifting or require physical activity outside the medical restrictions provided by Dr. Sidhu. There was no other probative medical evidence of record providing specific work restrictions. An attending physician, Dr. Michael Kyles, a Board-certified orthopedic surgeon, reported in a June 28, 2000 note, that he had not seen appellant since July 1999, that appellant was neurologically intact and he had nothing else to offer him. Based on the evidence of record, the job offer was medically suitable.

The Office advised appellant by letter dated October 31, 2001, that the job offer was considered suitable and he had 30 days to accept the offer or provide reasons for refusing. The Office noted the provisions of 5 U.S.C. § 8106(c)(2). In a letter dated November 27, 2001, the Office indicated that it had received a message that appellant requested additional time to respond to the job offer. The Office indicated that he had not provided acceptable reasons and he had an additional 15 days to accept the position.⁷ The record, therefore, indicated that appellant was provided with an opportunity to accept the position and notified of the provisions of section 8106(c)(2). There is no evidence of a procedural error in this case.

The Board accordingly finds that the evidence was sufficient to establish that the job offer was suitable and the Office followed appropriate procedures with respect to a termination of compensation under 5 U.S.C. § 8106(c)(2). The Office, therefore, may terminate compensation on the grounds that appellant refused an offer of suitable work.

⁶ See *Arthur C. Reck*, 47 ECAB 339, 342-43 (1996).

⁷ The record contains a December 21, 2001 letter from appellant indicating that he desired a permanent position rather than a temporary position. It does not appear, however, that the letter was received prior to the January 24, 2002 decision; the copy in the record is marked as received on February 7, 2002.

The Board notes that the June 21, 2004 decision initially stated that appellant's "claim for medical and wage-loss benefits has been terminated" as of June 13, 2004. The conclusion of the decision stated that "compensation for wage loss" was terminated. It is well established that termination under section 8106(c)(2) does not involve medical benefits.⁸ Since the conclusion of the decision limited the termination to wage-loss compensation, it is not clear whether the reference to medical benefits was inadvertent. The decision will be modified to reflect that appellant remains entitled to medical benefits in this case.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate compensation for wage loss effective June 13, 2004 on the grounds that appellant refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the June 21, 2004 decision of the Office of Workers' Compensation Programs is modified to reflect that the termination of compensation does not affect medical benefits and is affirmed as modified.

Issued: May 5, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

⁸ 20 C.F.R. § 10.517 (1999).