United States Department of Labor
Employees' Compensation Appeals Board

EUGENE T. SMIT, Appellant	)	
and	)	**Docket No. 05-1448**
	)	**Issued: January 11, 2006**
U.S. POSTAL SERVICE, CRESTON STATION, Portland, OR, Employer	)	

Appearances:
Eugene T. Smit, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 28, 2005 appellant filed a timely appeal of an August 27, 2004 merit decision by the Office of Workers' Compensation Programs, terminating his compensation and a March 7, 2005 nonmerit decision, finding his reconsideration request was untimely and did not establish clear evidence of error. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits and nonmerits of this case.

ISSUE

The issues are: (1) whether the Office properly terminated appellant's compensation on the grounds that he refused an offer of suitable work; and (2) whether the Office properly determined that appellant's request for reconsideration failed to present clear evidence of error.

FACTUAL HISTORY

On February 5, 2000 appellant, then a 39-year-old letter carrier, filed a traumatic injury claim alleging that on that date he injured his low back while he was moving a large cart full of mail down a ramp. The cart hit a pothole and he fell over top of the cart. By letter dated

April 11, 2000, the Office accepted appellant's claim for lumbar strain. His claim was later accepted for displacement of a lumbar intervertebral disc without myelopathy.

Appellant returned to work in a limited-duty position for the employing establishment on March 16, 2000. He returned to work light-duty four hours a day on February 18, 2001, but sustained intermittent periods of disability. In a medical report dated September 10, 2003, Dr. Geoffrey E. Baum, appellant's osteopathic physician and surgeon, noted that appellant continued to have low back and right hip pain. He opined that appellant was not able to perform light-duty work and recommended that he discontinue working for the employing establishment.

The Office referred appellant to Dr. E. Robert Wells, a Board-certified orthopedic surgeon, for a second opinion. In a report dated February 16, 2004, he indicated that his interpretation of appellant's x-rays and computerized tomography scan suggested the presence of a very significant compression of the distal cauda equine and the S1 nerve roots. Dr. Wells recommended a multidisciplinary panel to provide a final assessment. When he was provided a description of appellant's limited-duty position, Dr. Wells opined that he was capable of performing the duties within the restriction of the job description. He listed appellant's restrictions as sitting, walking and standing limited to 1 hour each, no twisting, squatting, kneeling or climbing, pushing and pulling of up to 15 pounds limited to ¼ hour a day, 10 minutes of lifting over 10 pounds. Dr. Wells opined that appellant should have 5 to 10 minute breaks hourly. In a March 4, 2004 addendum, he reviewed a new magnetic resonance imaging (MRI) scan and determined that it was not dramatically different from previous MRI scans and did not alter his initial impressions.

In a report dated April 1, 2004, Dr. Baum stated:

> "I have reviewed the [i]ndependent [m]edical [e]valuation from Dr. Wells and feel that he performed a very conscientious history and physical examination, as well as medical record review. I concur with his findings and recommendations.
>
> "[Appellant] could do a four-hour per day work release. However, the problems in the past have been that he has been asked to do activities which exceed his capabilities. If indeed [appellant] does return to work and if these restrictions are violated, I will then remove him from work."

On June 10, 2004 the employing establishment offered appellant a position as a letter carrier (rehabilitation position). This modified assignment would involve miscellaneous office duties within his limitations, sweeping the lobby and locking the lobby doors, uploading scanners and answering telephones. The physical requirements of this position would involve sitting for 2 to 3 hours, walking/standing for 1 hour and light lifting (less than 20 pounds) for ½ hour.

By letter dated June 17, 2004, appellant rejected the job offer. He stated that he was electing disability retirement and moving to Idaho with his parents.

By letter dated June 30, 2004, the Office informed appellant that the offered job was suitable and that he had 30 days to accept the position or provide an explanation for his refusal to

accept it. The Office also informed him that, if he failed to accept the position or provide a reasonable cause for his refusal, his compensation benefits would be terminated.

By letter dated August 3, 2004, the Office gave appellant an additional 15 days to accept the position without penalty. He responded in an undated letter received by the Office on August 16, 2004, indicating that he had moved to Idaho and has been separated from the employing establishment since December 30, 2003.

By decision dated August 27, 2004, the Office terminated appellant's wage-loss compensation for refusal of a suitable job offer.

On January 25, 2005 appellant requested reconsideration. He noted that he had moved and would like employment with the employing establishment in Weiser, Idaho, where he resided. By decision dated March 7, 2005, the Office denied appellant's request for reconsideration without review of the merits as he had not established "clear evidence of error."

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[1] Under section 8106(c)(2) of the Federal Employees' Compensation Act the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[2] To justify termination of compensation, the Office must show that the work offered was suitable[3] and must inform appellant of the consequences of refusal to accept such employment.[4] An employee who refuses or neglects to work after suitable work has been offered or secured for him has the burden of showing that such refusal or failure to work was reasonable or justified.[5] Additionally, the employee shall be provided the opportunity to make such a showing before entitlement to compensation is terminated.[6]

ANALYSIS -- ISSUE 1

The second opinion physician, Dr. Wells, found that appellant was able to return to his limited-duty part-time work. Dr. Baum, the treating physician concurred with the limited-duty restrictions as suitable for appellant. On June 10, 2004 the Office offered appellant a modified-duty position within his restrictions. He rejected the job offer. By letter dated June 30, 2004, the Office informed appellant that the offered job was suitable and gave him 30 days to either accept the position or provide an explanation for his refusal to accept it. He did not respond. In a letter

[1] *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

[2] 5 U.S.C. § 8106(c)(2); 20 C.F.R. § 10.517(a) (1999).

[3] *Arthur C. Reck*, 47 ECAB 339 (1996).

[4] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1972).

[5] *Bryan O. Crane*, 56 ECAB ___ Docket No. 05-232 (issued September 2, 2005).

[6] 20 C.F.R. §§ 10.516, 10.517(b) (1999); *John E. Lemker*, 45 ECAB 258, 263 (1993).

dated June 30, 2004, the Office provided appellant with 15 more days to accept the position without penalty. He responded by noting that he had relocated. Appellant did not provide an acceptable reason for not accepting the position.

The medical evidence establishes that appellant can perform the duties of the offered position. The Office followed its proper procedures under the Act for informing appellant of the position and the consequences of his not accepting the position or providing an adequate reason. The Office properly terminated his compensation under section 8106(2) of the Federal Employees' Compensation Act, based on his refusal of suitable work.[7]

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> (1) end, decrease or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."[8]

The Office's imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted the Office under section 8128(a).[9] This section does not mandate that the Office review a final decision simply upon request by a claimant.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[10]

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.[11]

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[7] 5 U.S.C. § 8106(c)(2).

[8] 5 U.S.C. § 8128(a).

[9] *Diane Matchem*, 48 ECAB 532, 533 (1997); citing *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[10] 20 C.F.R. § 10.607(a).

[11] 20 C.F.R. § 10.607(b).

ANALYSIS

On August 27, 2004 the Office terminated appellant's compensation benefits. On January 25, 2005 he requested reconsideration. By decision dated March 7, 2005, the Office denied his request for reconsideration on the basis that he had not established clear evidence of error. However, as appellant filed the request for reconsideration on January 25, 2005, it was timely filed. A right to reconsideration within one year accompanies any merit decision on the issues.[12] As appellant's request was timely filed, the Office improperly denied his reconsideration request by applying the legal standard reserved for cases where reconsideration is requested after more than one year. Since the Office erroneously reviewed the evidence submitted in support of his reconsideration request under the clear evidence of error standard, the Board will remand the case to the Office to apply the proper standard of review for a timely reconsideration request.[13]

CONCLUSION

The Office properly terminated appellant's compensation on the grounds that he refused a suitable offer of work. However, the Office improperly denied his request for reconsideration by applying the clear evidence of error standard to a timely filed request.

[12] *Larry J. Lilton*, 44 ECAB 243 (1992).

[13] *See Donna M. Campbell*, 55 ECAB __ (Docket No. 03-2223, issued January 9, 2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 27, 2004 is affirmed. The decision of the Office dated March 7, 2005 is vacated and this case is remanded for further consideration consistent with this opinion.

Issued: January 11, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
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