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| <b>A.B., Appellant</b>                   |  | ) |                                 |
|                                          |  | ) |                                 |
| <b>and</b>                               |  | ) | <b>Docket No. 06-1339</b>       |
|                                          |  | ) | <b>Issued: January 16, 2007</b> |
| <b>U.S. POSTAL SERVICE, POST OFFICE,</b> |  | ) |                                 |
| <b>Oklahoma City, OK, Employer</b>       |  | ) |                                 |
|                                          |  | ) |                                 |

### Case Submitted on the Record

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

On April 26, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated June 20, 2005 and February 24, 2006, which terminated appellant's schedule award and compensation benefits on the grounds that he had refused an offer of 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.

The issue is whether the Office met its burden of proof to terminate appellant's schedule award and compensation benefits effective June 20, 2005 on the grounds that appellant refused an offer of suitable employment, pursuant to 5 U.S.C. § 8106(c)(2).

On September 21, 1999 appellant, then a 39-year-old city carrier, filed an occupational disease claim alleging that as a result of the continuous lifting, twisting, bending and walking with a heavy weight on his shoulder he sustained a bulging disc in his lower back. The Office

accepted appellant's claim for aggravation of lumbar strain, aggravation of lumbar degenerative disc and radiculopathy. It paid appropriate compensation and medical benefits.

On October 15, 2003 appellant filed a claim for a schedule award. On February 3, 2004 the Office issued a schedule award for a 32 percent impairment of the left lower extremity and a 36 percent impairment of the right lower extremity. It noted that the period of the award was from January 25, 2004 through October 26, 2007.

On March 23, 2005 appellant's treating family practitioner, Dr. M.J. Schwartz, completed a work tolerance limitations form, wherein he opined that appellant was limited to working 4 hours of day, that he could stand/walk continuously for ½ an hour, that appellant could sit intermittently for 4 hours a day, that he could lift up to 10 pounds occasionally and that he could push/pull up to 10 pounds. Appellant was restricted from driving a car, squatting and twisting, but could bend, climb and kneel occasionally. Dr. Schwartz noted that these restrictions were permanent.

By letter dated May 4, 2005, the employing establishment offered appellant a position as a modified clerk. Appellant would box mail, retrieve caller service, open and close boxes and do administrative work. The employing establishment noted that the position would be within the limitations of standing/walking at ½ hour intervals, sitting up to 4 hours, lifting up to 10 pounds and pushing and pulling up to 10 pounds. Appellant would work four hours a day. On May 11, 2005 appellant indicated that he was declining the position as he was opting to take medical retirement.

By letter dated May 17, 2005, the Office indicated that it had reviewed appellant's work limitations as set by Dr. Schwartz in his report dated March 23, 2005 and that it had determined that the position of modified clerk offered by the employing establishment was suitable. The Office informed appellant that, if he did not accept the position, he should provide a written explanation within 30 days. It sent appellant a form wherein he could indicate that he did not accept the position and provide his reasons. This form was not returned. On May 19, 2005 appellant informed the Office that he had elected retirement effective June 1, 2005. On June 20, 2005 the Office verified that the offered position was still available.

By decision dated June 20, 2005, the Office terminated appellant's monetary benefits effective June 20, 2005 as appellant had refused suitable employment.

On July 7, 2005 appellant requested an oral hearing which was held on December 12, 2005.

In a December 20, 2005 report, Dr. Scott A. Mitchell, an osteopath, wrote that he had been treating appellant since February 2004 for severe back and leg pain related to a work injury on September 10, 1999. He indicated that appellant was unable to go back to a job that was offered in May 2004 as he was awaiting further treatment at that time.

By decision dated February 24, 2006, the hearing representative affirmed the Office's decision terminating compensation, but noted that appellant was entitled to benefits under his schedule award for the period prior to the termination.

### **LEGAL PRECEDENT**

It is well settled that, once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>1</sup> Section 8106(c) of the Federal Employees' Compensation Act<sup>2</sup> provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to compensation. To justify such a termination, the Office must show that the work offered was suitable.<sup>3</sup> The implementing regulation provides 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 showing before entitlement to compensation is terminated.<sup>4</sup> 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.<sup>5</sup> Section 8106(c) will be construed narrowly 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.<sup>6</sup> The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a question that must be resolved by medical evidence.<sup>7</sup>

### **ANALYSIS**

The Board finds that the Office properly terminated appellant's monetary compensation benefits effective June 20, 2005 on the grounds that he refused an offer of suitable work.

The Board finds that the report of appellant's physician, Dr. Schwartz, established that the position of modified clerk was within appellant's physical capabilities. Dr. Schwartz indicated that appellant could work 4 hours a day, could stand/walk continuously for ½ hour, could sit intermittently for 4 hours and could lift up to 10 pounds occasionally. In addition, Dr. Schwartz noted that appellant was restricted from driving a car, squatting and twisting.

Based on Dr. Schwartz' restrictions, on May 4, 2005 the employing establishment offered appellant a position as a modified clerk that required him to box mail, retrieve caller service, open and close boxes and do administrative work. Using Dr. Schwartz' restrictions as a guide, the employing establishment set limitations on appellant's physical duties on this job. The Board

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<sup>1</sup> See *Melvin James*, 56 ECAB \_\_\_\_ (Docket No. 03-2140, issued March 25, 2004).

<sup>2</sup> 5 U.S.C. § 8106(c)(2).

<sup>3</sup> *Joyce M. Doll*, 53 ECAB 790 (2002).

<sup>4</sup> 20 C.F.R. § 10.517(a).

<sup>5</sup> *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

<sup>6</sup> *Gloria G. Godfrey*, 52 ECAB 486 (2001).

<sup>7</sup> *Gayle Harris*, 52 ECAB 319 (2001).

finds that the physical requirements of the offered position were consistent with the restrictions set forth by Dr. Schwartz and that the position was medically suitable to appellant's work restrictions.

The Office properly followed its procedural requirements in this case. By letter dated May 17, 2005, it informed appellant that the position was suitable and in accordance with his medical restrictions and advised him that he had 30 days to report to duty or provide valid reasons for not doing so. Appellant did not submit a response indicating his reasons for refusing the position. Accordingly, his compensation was properly terminated.

As the Office met its burden of proof to terminate appellant's compensation based on his refusal of suitable work, the burden shifted to him to show that his refusal was justified.<sup>8</sup> Appellant submitted the report of Dr. Mitchell, which indicated that he was unable to work in May 2004. However, benefits were not terminated until June 20, 2005, over one year later. Dr. Mitchell does not address this time period.

A claimant who refuses an offer of suitable work is not entitled to further compensation, including payment of continuing compensation for permanent impairment of a scheduled member.<sup>9</sup> The Board has found that a refusal to accept suitable work constitutes a bar to the receipt of a schedule award for any impairment, which may be related to the accepted employment injury.<sup>10</sup> Accordingly, the Office properly terminated appellant's schedule award. The hearing representative properly noted that appellant was entitled to any portion of the schedule award for the period prior to the termination.

### **CONCLUSION**

The Board finds that the Office met its burden of proof to terminate appellant's schedule award and compensation benefits effective June 20, 2005 on the grounds that appellant refused an offer of suitable employment.

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<sup>8</sup> 20 C.F.R. § 10.500(b); see *Ozine J. Hagan*, 55 ECAB 681 (2004).

<sup>9</sup> 20 C.F.R. § 10.517.

<sup>10</sup> See *Sandra A. Sutphen*, 49 ECAB 174 (1997).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated February 24, 2006 and June 20, 2005 are affirmed.

Issued: January 16, 2007  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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