United States Department of Labor
Employees' Compensation Appeals Board

H.H., Appellant	)	
and	)	**Docket No. 07-1811**
	)	**Issued: March 5, 2008**
DEPARTMENT OF THE NAVY, NAVAL WEAPONS STATION, Concord, CA, Employer	)	

Appearances:
Appellant, pro se,
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 28, 2007 appellant filed a timely appeal from an Office of Workers' Compensation Programs hearing representative's decision dated March 15, 2007, which affirmed the termination of his compensation on the grounds that he refused an offer of suitable work. He also timely appealed the Office's May 14, 2007 decision, which denied his request for merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these issues.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation effective October 29, 2006 on the grounds that he refused an offer of suitable work; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On June 13, 1991 appellant, then a 53-year-old explosives operator, sustained injury to his left hip, thigh and low back while in the performance of duty. The Office accepted the claim for strain of the left hip and thigh and aggravation of degenerative disc disease at L5-S1. On June 18, 1991 appellant was involved in a bus accident and sustained an injury to his left shoulder while in the performance of duty.[1] The Office accepted that the June 18, 1991 accident caused a left rotator cuff tear. Appellant underwent surgery on October 29, 1992. He stopped work from August 19 through 30, 1991 and returned to light duty until December 30, 1991 when he stopped working. The Office doubled the claims under master File No. 13-0956958. Appellant was placed on the periodic rolls and received appropriate compensation benefits.

By letter dated March 30, 2005, the Office referred appellant to Dr. John Chu, a Board-certified orthopedic surgeon, for a second opinion examination.

In an April 27, 2005 report, Dr. Chu noted that appellant had complaints of pain in the left shoulder and left thigh. He performed a physical examination and diagnosed left thigh strain with continued discomfort; L5-S1 degenerative disc disease; and history of left rotator cuff repair with mild limitation in motion. Dr. Chu opined that appellant had work-related residuals but no further treatment was warranted other than medication. He indicated that appellant could return to work for eight hours per day with physical restrictions. Dr. Chu noted that appellant could walk or stand for no more than six hours, sit or stand for no more than 30 minutes, limited reaching above shoulder level and occasionally stand, stoop or twist.

By letter dated August 19, 2005, the Office provided a copy of Dr. Chu's report and Dr. Juon-Kin Fong, the attending orthopedic surgeon. The Office requested that he provide an opinion regarding appellant's ability to return to work, including any objective findings.

On November 10, 2005 the employing establishment offered appellant the position of a clerk working eight hours per day, five days per week, in Concord, California. Appellant was advised that this was a temporary appointment not to exceed one year. He was further advised that the position was sedentary in nature with no specific or unusual physical requirements and that he could sit or stand as his physical needs dictated. The position paid $29,907.00 per year.[2]

In a November 29, 2005 report, Dr. Fong conducted a physical examination and noted that there was spasm of the adductors of the left thigh and tightness of the lower back. He indicated that left shoulder motion was unchanged and limited in flexion and extension. Dr. Fong opined that the physical restrictions recommended by Dr. Chu were not appropriate for appellant as he was almost 69 years old and had not worked in almost 15 years. He indicated that appellant's left shoulder motion was limited due to his rotator cuff injury and also that the degenerative disc disease in his back limited his ability to stand, walk and lift. Dr. Fong opined

[1] The record reflects that appellant was on temporary-duty assignment.

[2] The record contains several copies of this job offer. A subsequent copy indicates that the salary was $33,559.00 per year.

that appellant was faring reasonably well because he was extremely sedentary and rested often. He advised that it was doubtful that appellant would be able to withstand an eight-hour workday.

By letter dated December 15, 2005, the Office advised appellant that the clerk position had been found to be suitable to his capabilities and was currently available. The Office indicated that the position had been found suitable in accordance with the medical restrictions provided by Dr. Chu. Appellant was advised that he should accept the position or provide an explanation for refusing the position within 30 days. The Office informed appellant that if he failed to accept the offered position and failed to demonstrate that the failure was justified, his compensation would be terminated.[3]

Appellant returned to work in the modified clerk position on February 21, 2006 for eight hours, seven hours on February 22, 2006 and one and a half hours on February 23, 2006. He stopped work thereafter.

On March 7, 2006 Dr. Fong indicated that appellant was totally disabled from February 24 to March 23, 2006. He examined appellant and determined that appellant had spasm of the adductors of the left thigh with pain on palpation, giving way of muscles of the left leg secondary to pain, diminished motion of the lower back in flexion and extension and muscle spasm of the lower back. Dr. Fong opined that the unaccustomed activity caused a "major flare-up of his degenerative disc disease of the lumbar spine with left leg sciatica." He opined that appellant was too symptomatic to return to work and was totally disabled. On March 23, 2006 Dr. Fong opined that appellant could return to work at four hours per day as a clerk in a sedentary position. He noted that the position needed to be within a 30-minute drive of his home.

In a memorandum dated May 1, 2006 the employing establishment noted that appellant's "primary duties were dispatching, which requires receiving calls and entering them in a log book. These duties can be accomplished either sitting or standing and the workstation can accommodate the use of a cane, walker or a wheelchair."

In a May 23, 2006 report, Dr. Fong opined that appellant could return to work half time. He noted that appellant was moving to Monroe, Louisiana. In a June 27, 2006 report, Dr. Fong found that appellant had mild trapezial spasm with about 50-percent of his normal motion and strength and negative straight leg raising on the left. He indicated that appellant had tenderness and tightness of the left thigh adductor muscles and intact sensation, but that he was able to walk without a cane. Dr. Fong advised additional physical therapy and noted that he would see appellant in a month, but thereafter, he was moving to Louisiana.

[3] The record reflects that a telephone conference was also held on December 15, 2005 with appellant, the rehabilitation counselor and the agency injury compensation specialist. The Office explained that the offer was based upon the second opinion report and found to be medically suitable based on the second opinion report from Dr. Chu. The Office also advised appellant of the sanctions for refusing the offered position. Appellant alleged that his physician, Dr. Fong had submitted a report; however, the Office noted that Dr. Fong did not provide a rationalized explanation as to why appellant could not perform modified duties.

On July 11, 2006 the Office paid appellant compensation for total wage loss for the period February 28 to July 7, 2006. The Office indicated that he was being placed on the periodic rolls effective July 8, 2006.[4]

On July 14, 2006 the Office referred appellant for a second opinion, together with a statement of accepted facts, a set of questions and the medical record to Dr. Aubrey Swartz, a Board-certified orthopedic surgeon.

In a report dated August 14, 2006, Dr. Fong repeated his findings and noted that appellant had purchased a home in Louisiana and was relocating.

In an August 14, 2006 report, Dr. Swartz noted appellant's history of injury and treatment. He conducted an examination, indicating that appellant was extremely obese. Dr. Swartz noted that appellant was involved in two auto accidents, one in 1993 and 2003. He opined that the current left shoulder condition was not due to the work injury but due to subsequent injuries he sustained. Dr. Swartz determined that the only work-related condition that appellant had was recurrent left hip tendinitis. He advised that the aggravation of degenerative disc disease in appellant's lumbar spine was temporary and had resolved by February 1995. Dr. Swartz opined that appellant was able to perform the duties of the modified clerk position, described as an office job with minimal physical demands. He could find no physical reason why appellant could not perform the modified position, as appellant indicated that he drove to the office in his own car and was able to shower, grocery shop, clean house, vacuum, sweep, mop, make beds, change the linens, take out garbage, perform household repairs and move furniture in the house. Dr. Swartz completed a work capacity evaluation on August 27, 2006 and advised that appellant could work eight hours per day within restrictions.

On August 30, 2006 the Office confirmed that appellant had moved to Louisiana. On September 9, 2006 the Office received a facsimile from appellant requesting that his address be changed to Monroe, Louisiana.

On September 11, 2006 the employing establishment advised the Office that the clerk position was still available.

By letter dated September 11, 2006, the Office advised appellant that the clerk position was deemed medically suitable based on the August 14, 2006 opinion of Dr. Swartz. Appellant was advised that the employing establishment had confirmed that the position remained available to him. He was advised that he should accept the position or provide an explanation for refusing the position within 30 days. Finally, the Office informed appellant that, if he failed to accept the offered position and failed to demonstrate that the failure was justified, his compensation would be terminated.

[4] The record reflects that on April 28, 2006 appellant filed a Form CA-2a, notice of recurrence of disability. He alleged that his recurrence began on February 24, 2006. It appears that this was accepted by the Office, as the periodic rolls' payment began on February 28, 2006.

In a memorandum of telephone call dated September 28, 2006, the Office advised appellant that if he did not take the offered position, he could forfeit his compensation and the fact that he had moved to Louisiana was not a valid reason for refusing the position.

On October 24, 2006 the employing establishment reiterated that the offered position remained available to appellant in California.

By decision dated October 27, 2006, the Office terminated the appellant's entitlement to monetary compensation benefits, effective October 29, 2006, on the basis that he refused an offer of suitable work. The Office determined that, the report of Dr Swartz, the second opinion physician, represented the weight of the evidence.

Appellant subsequently requested a review of the written record on November 7, 2006. In a statement accompanying his request, he contested the Office's termination of his benefits and advised that he was unable to work. Appellant called the Office on December 6, 2006, requesting that his claim be reopened.

By letter dated January 19, 2007, appellant stated that he had relocated to Monroe, Louisiana, to receive assistance with his daily functions from family members. He alleged that he was unable to work due to his injury and the medication he was required to take. Appellant indicated that he was under a physician's care. He contended that he was unable to read and understand the questions on the form he filled out for Dr. Swartz, due to effects of medication. Appellant alleged that he was unable to perform regular activities without assistance.

In a January 8, 2007 report, Dr. J.D. Patterson, a Board-certified family practitioner and treating physician, noted appellant's history of injury and treatment. He advised that appellant was injured in a work-related accident on June 13, 1991 and was disabled since the incident. Dr. Patterson related that appellant had complaints of pain in the left hip and shoulder and conducted an examination. As to the left shoulder, appellant had resistance on abduction, minimal spasm and tenderness to palpation of the supraclavicular and shoulder girdle regions. For the lower extremities, Dr. Patterson noted bilateral pain and tension on the weight bearing left hip and increased pain with range of motion. He diagnosed the chronic hip strain and left shoulder strain.

By decision dated March 15, 2007, the Office hearing representative affirmed the October 27, 2006 decision.

On April 17, 2007 appellant requested reconsideration. He alleged that he was unable to work and his condition had not improved. Appellant also indicated that Dr. Patterson would be submitting a letter regarding his inability to work.

By decision dated May 14, 2007, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that his request neither raised substantial legal questions nor included new and relevant evidence and, thus, it was insufficient to warrant review of its prior decision.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits.[5] This includes cases in which the Office terminates compensation under section 8106(c)(2) of the Federal Employees' Compensation Act for refusal to accept suitable work.

Section 8106(c)(2)[6] of the Act 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. Section 10.517(a)[7] of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured for him or her has the burden to show that this refusal or failure to work was reasonable or justified. After providing the two notices described in section 10.516,[8] the Office will terminate the employee's entitlement to further compensation under 5 U.S.C. §§ 8105, 8106 and 8107, as provided by 5 U.S.C. § 8106(c)(2). However, the employee remains entitled to medical benefits as provided by 5 U.S.C. § 8103 or justified. To justify termination, the Office must show that the work offered was suitable[9] and must inform appellant of the consequences of refusal to accept such employment.[10] According to Office procedures, certain explanations for refusing an offer of suitable work are considered acceptable.[11] Unacceptable reasons include appellant's preference for the area in which he resides; personal dislike of the position offered or the work hours scheduled; lack of promotion potential or job security.[12]

With regard to relocation, Office regulations provide that the employer, if possible, 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.[13]

---

[5] *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

[6] 5 U.S.C. § 8106(c)(2).

[7] 20 C.F.R. § 10.517(a).

[8] *Id*. at § 10.516.

[9] *See Carl W. Putzier*, 37 ECAB 691 (1986); *Herbert R. Oldham*, 35 ECAB 339 (1983).

[10] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff d on recon.*, 43 ECAB 818 (1992). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(d)(1).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(1)-(5).

[12] *Arthur C. Reck*, 47 ECAB 339 (1996); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(c) (July 1996).

[13] 20 C.F.R. § 10.508; *Sharon L. Dean*, 56 ECAB 175 (2004).

ANALYSIS -- ISSUE 1

In this case, the employing establishment offered appellant a sedentary position in Concord, California, which accommodated the work restrictions given by Dr. Swartz, the second opinion physician. The Office reviewed the position and found it to be suitable for appellant. After appellant did not report for duty, the Office terminated his compensation for refusing suitable work.

To properly terminate compensation under section 8106(c), the Office must provide appellant notice of its finding that an offered position is suitable and give him an opportunity to accept or provide reasons for declining the position.[14] By letter dated September 11, 2006, the Office advised appellant that the position was suitable and provided him 30 days to accept the position or provide reasons for his refusal. The Office further notified appellant that the position remained open, that he would be paid for any difference in pay between the offered position and his date-of-injury job, that he could still accept without penalty and that a partially disabled employee who refused suitable work was not entitled to compensation.

The record reflects that on September 9, 2006 appellant informed the Office that he had moved to Monroe, Louisiana. In a memorandum of telephone call dated September 28, 2006, the Office informed appellant that the fact that he had moved to Louisiana was not a valid reason for refusing the job offer in California. However, the Board notes that the Office did not make any attempt to determine whether suitable employment was possible in or around Monroe, Louisiana, where appellant resided at the time of the job offer.[15] 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 in or around Monroe, Louisiana. The Office should have developed this aspect of the case before finding the offer suitable. The Office regulations state that the employer should offer suitable reemployment where the employee currently resides, if possible.[16] In this case, appellant would have needed to move over 2000 miles to accept the offered position in Concord, California. The Office, therefore, should have developed the issue of whether suitable reemployment was possible in the Monroe, Louisiana, area. The Board finds that the Office erred in terminating appellant's compensation benefits without positive evidence showing that such an offer was not possible or practical.[17]

[14] *See Maggie L. Moore*, *supra* note 10.

[15] The Office also did not allow appellant 15 days in which to accept the position after it determined that his reason for refusing the position was unacceptable. *See Maggie L. Moore*, *id*.; 20 C.F.R. § 10.516.

[16] 20 C.F.R. § 10.508. *See Sharon L. Dean*, *supra* note 13.

[17] *Id.*

Under the circumstances of this case, the Office did not properly find that appellant refused suitable work.[18]

CONCLUSION

The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation effective October 29, 2006 on the grounds that he refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the May 14 and March 15, 2007 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: March 5, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[18] In light of the Board's finding on the first issue, the second issue is moot.