United States Department of Labor
Employees' Compensation Appeals Board

G.S., Appellant	)	
and	)	**Docket No. 11-691**
	)	**Issued: October 14, 2011**
U.S. POSTAL SERVICE, CHATTANOOGA PROCESSING & DISTRIBUTION CENTER, Chattanooga, TN, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 25, 2011 appellant filed an appeal from an October 20, 2010 decision of an Office of Workers' Compensation Programs' (OWCP) hearing representative who affirmed the termination of his wage-loss compensation on the grounds that he refused an offer of suitable work. Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 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 OWCP properly terminated appellant's compensation benefits effective February 8, 2010 pursuant to 5 U.S.C. § 8106(c).

On appeal appellant asserts that the offered position was outside his restrictions and that the employing establishment would not let him enter the building to work.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On October 20, 2008 appellant, then a 55-year-old mail handler, sustained employment-related tears to the supraspinatus and suprascapularis tendons of the right shoulder while loading mail. He worked modified duty. On December 2, 2009 Dr. Todd Bell, a Board-certified orthopedic surgeon, performed right shoulder arthroscopy with subacromial decompression, distal clavicle resection, and repair of a large rotator cuff tear. Appellant received wage-loss compensation. On December 14, 2009 he was referred to a medical management nurse.

In reports dated January 11, 2010, Dr. Bell provided findings on physical examination and advised that appellant was progressing slowly and had significant postoperative stiffness. He recommended continued physical therapy and advised that appellant could return to work that day with a restriction of no use of the right arm.

On January 15, 2010 the employing establishment offered appellant a modified mail handler position. The physical requirements were standing with fine manipulation for five hours, sitting with fine manipulation for three hours, and no use of the right arm. Appellant accepted the offered position that day. He did not begin work and filed claims for continued wage-loss compensation.[2] On a form report dated January 22, 2010, Dr. Bell again advised that appellant could return to work on January 11, 2010 with no use of the right arm. He stated that the restrictions were due to appellant's December 2, 2009 right shoulder injury and noted that he had normal postoperative pain and swelling.

By letter dated January 29, 2010, OWCP advised appellant that the position offered was suitable. Appellant was notified that, if he failed to report to work or failed to demonstrate that the failure was justified, pursuant to section 8106(c)(2) of FECA, his right to compensation for wage loss or a schedule award would be terminated. He was given 30 days to respond.

On February 1, 2010 appellant contended that Dr. Bell had not released him to return to work due to extreme pain but referred him to pain management and physical therapy. He stated that the pain kept his blood pressure elevated and that he was unable to work due to his medications. Appellant visited a hospital emergency room on January 26, 2010 where it was determined that he was experiencing an anxiety disorder. He submitted a one-page emergency room report signed by a nurse that did not include any diagnosis and advised that appellant could return to work on January 19, 2010 within previous work restrictions. On a form report dated January 28, 2010, Dr. Bell advised that appellant should not use his right arm. Appellant had pain and swelling which was normal after shoulder surgery and received a normal amount of postoperative pain medication. The phrase "patient to return to work with" was crossed out. In a work capacity evaluation dated February 1, 2010, Dr. Bell advised that appellant could work four eight hours a day with no use of the right arm. He advised that appellant should not take narcotic pain medications at work. In a February 12, 2010 letter, appellant stated that he was taking hydrocodone and morphine to control his shoulder pain and therefore it was unsafe for him to return to work.

[2] Appellant was paid wage-loss compensation through January 14, 2011.

On March 3, 2010 OWCP advised appellant that his reasons for refusing the offered position were not valid, and he was given an additional 15 days to accept. Appellant submitted a January 28, 2010 treatment note in which Dr. Bell provided physical examination findings and advised that he should continue physical therapy. Appellant could continue light daily use of the right arm with no lifting over a pound. Dr. Bell advised that appellant's work restrictions were of no right arm use, adding that he thought it would be beneficial for appellant to work. He discussed appellant's pain medications, and provided several names of pain management specialists. Dr. Bell prescribed a tapering dose of Lortab. In a February 10, 2010 report, he advised that on January 28, 2010 appellant was given a work restriction of no use of the right arm. Any restrictions regarding medications would have to be addressed by the provider who prescribed the medication. On February 11, 2010 Dr. Bell advised that appellant had called him repeatedly with requests to be taken out of work. He advised that appellant's restriction was no use of the right arm, and that any restrictions regarding medications would have to be addressed by the prescribing provider.

On a disability slip dated February 23, 2010, Dr. Bernard Parham, a Board-certified internist, advised that appellant had been under his care that day. In a brief treatment note of March 5, 2010, Dr. Cornelius J. Mance, Board-certified in internal medicine and neurology, advised that appellant was prescribed medications including hydrocodone and morphine. On March 6, 2010 he advised that appellant had been unable to work since January 11, 2010 because he was on pain medication, with an appended note that, if it was all right with the employer, appellant could work with no use of the right arm and shoulder. Dr. Mance stated that appellant was to see Dr. Gregory Ball, a Board-certified anesthesiologist, on March 8, 2010 for pain management. In a March 8, 2010 report, Patricia Springer, a nurse practitioner and an associate of Dr. Ball, advised that appellant had been completely incapacitated since January 11, 2010 and his disability would continue until April 1, 2010.

In reports dated March 11, 2010, Dr. Bell provided examination findings and advised that appellant should continue physical therapy and daily home exercises. He stated that appellant could begin work with restrictions of no overhead use of the right arm, no lifting greater than two pounds with the right arm, and no repetitive or forceful reaching, pushing or pulling with the right arm. On March 23, 2010 Dr. Bell stated that appellant was referred to Dr. Ball for pain management.

By decision dated April 2, 2010, OWCP terminated appellant's compensation benefits on the grounds that he refused to accept an offer of suitable work.

Appellant returned to modified duty on April 14, 2010. On April 22, 2010 he requested a hearing, and submitted correspondence from Julius Z. Takacs, a union branch president, who advised that on February 24, 2010 appellant went to the employing establishment and Cindy Bingham, supervisor of distribution operations, would not let him on the floor and told Mr. Takacs to return to work. On March 10, 2010 the employing establishment had an investigative interview with management officials, appellant and Mr. Takacs present. Appellant was asked about his documentation and was accused of falsifying paperwork from Dr. Bell's office. Mr. Takacs stated that, when the meeting was over, appellant was told to leave the building and did so.

In a March 8, 2010 report, Ms. Springer advised that appellant could not work from January 11 to April 1, 2010. It was cosigned by Dr. Ball. On April 13, 2010 Dr. Mance advised that appellant could return to light duty. By report dated April 22, 2010, Dr. Bell advised that appellant's restrictions were no overhead use or lifting more than 10 pounds with the right arm. On May 28, 2010 Dr. Mance advised that appellant could return to regular work. On June 17, 2010 Dr. Bell reiterated his restrictions and advised that appellant could not use the small parcel bundler sorter line. On June 29, 2010 he provided a right arm impairment rating. In a March 8, 2010 treatment note, Ms. Springer provided examination findings, reported appellant's medication regimen, and advised that he asked "for complete incapacitation note from January 11 to April 1 so he can get his benefits; will do." She submitted additional reports dated from April 6 to June 2, 2010.

At the August 2, 2010 hearing, appellant testified that he did not alter medical reports and that the employing establishment would not let him return to work. He was in too much pain to return to work on January 15, 2010, and the job offer was unsafe since he would have to use both arms. Appellant filed an Equal Employment Opportunity (EEO) complaint. Three weeks after he returned to work, he had a heart attack but was now working regular duty.

By letter dated August 27, 2010, a health resources management specialist at the employing establishment advised that appellant's concern regarding entry into the employing establishment was an EEO matter. On September 28, 2010 appellant stated that he had not been allowed to enter the employing establishment on three occasions, and reiterated that he had not falsified medical evidence. He submitted an August 2, 2010 note in which Dr. Ball described appellant's current complaints, his physical findings and medication regimen.

In an October 20, 2010 decision, OWCP's hearing representative affirmed the April 2, 2010 decision, finding that appellant refused or neglected an offer of suitable employment.

LEGAL PRECEDENT

Section 8106(c) of FECA 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."[3] It is OWCP's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[4] The implementing regulations provide 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.[5] To support termination, OWCP must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[6] In determining what constitutes "suitable work" for a particular

[3] 5 U.S.C. § 8106(c).

[4] *Joyce M. Doll*, 53 ECAB 790 (2002).

[5] 20 C.F.R. § 10.517(a).

[6] *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

disabled employee, OWCP considers the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work, and other relevant factors.[7] The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence.[8] OWCP procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.[9]

ANALYSIS

OWCP accepted that appellant sustained tears to the supraspinatus and suprascapularis tendons of the right shoulder while loading mail on October 20, 2008. In an April 2, 2010 decision, it terminated his monetary compensation on the grounds that he refused or neglected a January 15, 2010 offer of suitable employment. This decision was affirmed by OWCP's hearing representative on October 20, 2010. The issue is whether OWCP properly determined that the offered position was suitable, a medical question that must be resolved by the probative medical evidence.[10] The medical evidence in this case establishes that the January 15, 2010 position offered by the employing establishment was suitable.

Dr. Bell, an attending Board-certified orthopedic surgeon, performed corrective shoulder surgery on December 2, 2009. On January 11, 2010 he advised that appellant could return to work that day with a restriction of no use of the right arm. On January 15, 2010 the employing establishment offered appellant a modified position for eight hours a day, with the physical restriction of no use of the right arm. Appellant accepted the position but did not return to work. The only restriction provided by Dr. Bell was no use of the right arm. The evidence supports that the position offered on January 15, 2010 was suitable as the weight of the medical evidence established that he was no longer totally disabled from work and had the physical capacity to perform modified duties listed in the January 15, 2010 job offer. Furthermore, in reports dated January 22 to February 1, 2010, Dr. Bell reiterated that appellant could work with no use of the right arm. While the phrase "patient to return to work with" was crossed out on a January 28, 2010 disability slip, the physician advised that appellant could not use his right arm. Dr. Bell also advised that appellant's work restrictions were no use of the right arm and that it would be beneficial for him to work. On February 11, 2010 he advised that appellant had called him repeatedly with requests that he be taken off work. On March 11, 2010 Dr. Bell eased appellant's restrictions, stating that he could work with no overhead use of the right arm, no lifting greater than two pounds with the right arm, and no repetitive or forceful reaching, pushing or pulling with the right arm.

[7] 20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB 681 (2004).

[8] *Gayle Harris*, 52 ECAB 319 (2001).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5.a(1) (July 1997); *see Lorraine C. Hall*, 51 ECAB 477 (2000).

[10] *Gayle Harris, supra* note 8.

The March 8, 2010 report of Ms. Springer, a nurse practitioner, does not constitute competent medical evidence as a nurse practitioner is not a physician under FECA.[11] In a February 23, 2010 report, Dr. Parham did not comment on appellant's ability to work. Dr. Mance advised on March 5, 2010 that appellant had been prescribed narcotic medications, and stated on March 6, 2010 that he had been unable to work since January 11, 2010 because he was on pain medication. However, he also appended a note that, if it was all right with the employer, appellant could work with no use of the right arm and shoulder. Dr. Mance's reports do not provide sufficient rationale addressing why appellant could not perform the duties of the modified position. Dr. Parham did not indicate when and by whom the medication was prescribed or how it prevented appellant from performing the modified duties. The Board finds that the weight of the medical evidence rests with the opinion of Dr. Bell and supports that appellant could perform the duties of the position offered on January 15, 2010.

In order to properly terminate appellant's compensation under section 8106 of FECA, OWCP must provide appellant notice of its finding that an offered position is suitable and give appellant an opportunity to accept or provide reasons for declining the position.[12] The record in this case indicates that OWCP properly followed the procedural requirements. By letter dated January 29, 2010, OWCP advised appellant that the offered position was suitable. Appellant was notified that, if he failed to report to work or failed to demonstrate that the failure was justified, his right to monetary compensation would be terminated, and he was allotted 30 days to either accept or provide reasons for refusing the position. On March 3, 2010 he was given an additional 15 days in which to respond. There is, therefore, no evidence of a procedural defect in this case as OWCP provided appellant with proper notice. Appellant was offered a suitable position by the employing establishment and the offer was refused. Thus, under section 8106(c), his monetary compensation was properly terminated on April 2, 2010 on the grounds that he refused an offer of suitable employment.[13]

After OWCP established that the offered work was suitable, the burden shifted to appellant to show that his refusal was reasonable or justified.[14] While appellant submitted a statement from Mr. Takacs, the union president, alleging that appellant was told to leave the building, this was after an investigative interview held on February 24, 2010, there is nothing in Mr. Takacs' statement to indicate that appellant had appeared at the employing establishment in an attempt to return to work before his benefits were terminated. Moreover, in correspondence dated February 10 and 12, 2010, appellant asserted that he was unable to return to work due to shoulder pain and medication and also testified at the hearing that he was unable to work due to pain.

[11] *L.D.*, 59 ECAB 648 (2008). Section 8101(2) of FECA defines the term "physician" to include surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by state law. 5 U.S.C. § 8101(2).

[12] *See Maggie L. Moore*, *supra* note 6.

[13] *Joyce M. Doll*, *supra* note 4.

[14] *M.S.*, 58 ECAB 328 (2007).

Appellant also resubmitted Ms. Springer's March 8, 2010 report that had been cosigned by Dr. Ball. Dr. Ball, however, did not provide any rationale in support of his stated opinion that appellant could not work from January 11 to April 1, 2010. He did not describe appellant's condition in any way or explain how his condition rendered him unable to perform the modified duties with no use of his right arm. Furthermore, in a March 8, 2010 treatment note, Ms. Springer stated that appellant asked her "for complete incapacitation note from January 11 to April 1 so he can get his benefits; will do." On April 13, 2010 Dr. Mance advised that appellant could return to light duty, and he returned to work on April 14, 2010. In an April 22, 2010 report, Dr. Bell lessened appellant's restrictions, and on May 28, 2010 Dr. Mance advised that appellant could return to regular work. In additional reports dated June 17 to August 2, 2010, Dr. Bell discussed appellant's current condition and physical restrictions. Appellant therefore submitted insufficient medical evidence to establish that his neglect of the suitable position was justified.

The Board notes that it does not appear from the record that appellant was paid wage-loss compensation after January 11, 2010. Appellant would be entitled to appropriate monetary compensation until the date of termination decision, *i.e.*, April 2, 2010.

Appellant may submit new evidence or argument with a written request for reconsideration with OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly terminated appellant's wage-loss compensation pursuant to 5 U.S.C. § 8106(a) and that he did not, thereafter, establish that his refusal of suitable work was justified.

ORDER

IT IS HEREBY ORDERED THAT the October 20, 2010 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: October 14, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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