

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WADE A. JONES and U.S. POSTAL SERVICE,
POST OFFICE, Cincinnati, OH

*Docket No. 00-2804; Submitted on the Record;
Issued October 2, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly denied compensation for disability resulting from authorized surgery on May 13, 2000.

On August 8, 1988 appellant, then a 29-year-old mailhandler, filed an occupational disease claim asserting that his back, hip and leg pain were a result of his federal employment. The Office initially accepted his claim for lumbosacral strain and temporary aggravation of preexisting chronic back condition but later expanded its acceptance to include the permanent aggravation of lumbar degenerative disc disease. The Office approved surgeries in 1990 and 1994 and paid compensation for wage loss.

In a decision dated September 15, 1995, the Office terminated appellant's compensation benefits after September 16, 1995 on the grounds that he had refused an offer of suitable work and was no longer entitled to compensation under 5 U.S.C. § 8106(c)(2).¹

On September 21, 1999 the Office authorized surgery for the removal of hardware, evaluation for pseudarthrosis and translumbar interbody fusion at L3-4 and L5-S1. The Office had determined that the surgery was related to appellant's accepted employment injury.

Appellant stopped work on May 12, 2000 and filed a claim for a recurrence of disability resulting from the approved surgery. He underwent surgery the following day, May 13, 2000. Appellant's attending physician completed a form report supporting total disability for work beginning May 13, 2000.

By letter dated May 26, 2000, the Office notified appellant that it had accepted his claim of recurrence as his surgery date was May 13, 2000 and he would have a wage loss due to his recuperation period.

¹ The Board has no jurisdiction to review the merits of this decision. 20 C.F.R. § 501.3(d) (an appeal must be filed no later than one year from the date of issuance of the Office's final decision).

Appellant filed additional claims for compensation. His attending physician again supported total disability for work following surgery.

In a decision dated June 2, 2000, the Office denied compensation for wage loss on the grounds that appellant had no entitlement to wage-loss benefits after refusing an offer of suitable work.

Appellant requested reconsideration and argued that, had he known the Office would not compensate him for lost wages, he would have postponed the surgery until he had enough annual or sick leave to cover his absence from work.

In a decision dated June 22, 2000, the Office reviewed the merits of appellant's case and denied modification of the June 2, 2000 decision.

Appellant again requested reconsideration. He submitted a June 22, 2000 medical report that he was unable to return to work due to his employment-related surgery on May 13, 2000.

In a decision dated August 30, 2000, the Office found that, even though it continued to pay for ongoing medical care, appellant was not entitled to receive compensation for wage loss due to the sanctions imposed under 5 U.S.C. § 8106.²

The Board finds that the Office properly denied compensation for disability resulting from authorized surgery on May 13, 2000 on the grounds that appellant had refused suitable work in 1995 and was not entitled to such compensation under 5 U.S.C. § 8106(c)(2).

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits. This holds true where, as here, the Office later decides that it erroneously accepted a claim. To justify rescinding its acceptance of a claim, the Office must show that it based its rescission on new evidence, legal argument or rationale.³

On May 26, 2000 the Office notified appellant that it had accepted his May 12, 2000 claim of recurrence. The Office noted that appellant's surgery was May 13, 2000 and that he would have a wage loss during his recuperation period. Following additional claims for wage-loss compensation, the Office issued a decision on June 2, 2000 denying appellant's claims on the grounds that he was not entitled to compensation for wage loss. As this decision effectively rescinded the May 26, 2000 acceptance of appellant's claim of recurrence, the Office bears the burden of proof to show that it based its rescission on new evidence, legal argument or rationale.

The Board finds that the Office based its rescission on a new legal argument or rationale. The Office argued that appellant had refused suitable work in 1995 and was therefore not entitled to compensation for wage loss. The record establishes that the Office terminated appellant's compensation for wage loss in 1995 for refusing suitable work under 5 U.S.C. § 8106(c)(2).

This section provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for him is not entitled to compensation.

² Although the Office concluded that appellant's request for reconsideration did not warrant a review of the prior decision, the Board finds that it conducted a merit review of appellant's claims for compensation following surgery.

³ *Katherine A. Kirtos*, 42 ECAB 160 (1990).

Section 8106(c), which is a penalty provision, serves as a permanent bar to compensation for wage loss.⁴ A decision terminating compensation under section 8106(c) should not be modified even if the claimant's medical condition later deteriorates and he or she claims a recurrence of total disability.⁵ The Office has determined, however, that termination of compensation under section 8106(c) will not serve as a bar to further medical benefits arising from the accepted employment injury.⁶

Appellant's refusal of suitable work bars him from any compensation for wage loss arising subsequent to September 16, 1995 due to this accepted injury, including any wage loss resulting from his authorized surgery on May 13, 2000.⁷ Because the Office has shown that its May 26, 2000 acceptance of appellant's May 12, 2000 claim of recurrence was erroneous under the law, it has met its burden of proof to justify the rescission of that acceptance. The Board will affirm the Office's decisions rescinding acceptance and denying compensation for wage loss.

The August 30, June 22 and 2, 2000 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
October 2, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member

⁴ *E.g., Henry P. Gilmore*, 46 ECAB 709 (1995) (holding that employment obtained after neglect of suitable work does not justify resumption of compensation for wage loss); *Merlind K. Cannon*, 46 ECAB 581 (1995) (the claimant was not entitled to compensation benefits based on his accepted employment injury of tarsal tunnel syndrome, including compensation for a consequential injury, RSDS, arising from the accepted employment injury).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5.d(1) (December 1993).

⁶ FECA Bulletin No. 83-51 (issued October 24, 1983).

⁷ It is clear that in deciding to undergo surgery on May 13, 2000, appellant cannot have relied on the Office's May 26, 2000 decision to cover his absence from work. His failure to understand the consequences of his 1995 refusal or the Office's failure to make clear that authorization for surgery on May 13, 2000 would not entitle him to compensation for resulting wage loss does not create an exception to the permanent bar imposed by section 8106(c).