

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES L. HIGH and U.S. POSTAL SERVICE,
POST OFFICE, Oakland, CA

*Docket No. 01-1831; Submitted on the Record;
Issued October 22, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective January 4, 2001 for refusal to accept suitable work.

The Office accepted appellant's claim for right carpal tunnel syndrome, right shoulder tendinitis and right rotator cuff impingement. On September 13, 1999 appellant underwent right rotator cuff repair and had repeat surgery on May 2, 2000.

In a work capacity evaluation dated July 21, 2000, appellant's treating physician, Dr. Kirk L. Jensen, a Board-certified orthopedic surgeon, stated that appellant could work eight hours a day subject to no lifting, pushing or pulling more than 25 pounds. He also stated that appellant should not perform repetitive work or work above the left shoulder level and should not perform any work involving the right upper extremity. On July 26, 2000 Dr. Christopher J. Coufal, an orthopedic surgeon, concurred with Dr. Jensen's restrictions. In a work capacity evaluation dated September 8, 2000, Dr. Jensen indicated that appellant should not perform any pushing, pulling, lifting, climbing, driving and reaching.

On October 27, 2000 the employing establishment offered appellant the job of modified handler with restrictions of pushing, pulling and lifting up to 25 pounds, no work involving the right upper extremity, and no repetitive work or work above the left shoulder level. On October 29, 2000 appellant signed his acceptance of the job offer. On November 2, 2000 the employing establishment offered appellant the job of modified mailhandler with Dr. Jensen's revised September 8, 2000 restrictions. The additional physical requirements were no pushing, pulling, lifting, no climbing and no operating a motor vehicle.

On November 2, 2000 the Office stated that the job of modified mailhandler was available and within appellant's work capabilities. The Office gave appellant 30 days to accept the job offer or to give reasons for refusing it. On November 3, 2000 Dr. Jensen signed his approval of the October 27, 2000 job offer. On November 29, 2000 appellant signed his

acceptance of the job offer which an individual indicated the Office received on January 18, 2001.

On December 13, 2000 the Office stated that, after appellant accepted the October 29, 2000 job offer, he was expected to return to work on December 1, 2000 but to date he had not returned to work. The Office gave appellant 15 days to accept the position without penalty.

In a note dated January 4, 2001 (apparently erroneously dated January 4, 2000), an individual named "Bill" from the employing establishment stated on an Office telephone call report form that he called the human resources specialist, Mary Young, to find out if appellant had returned to work after the 15-day letter had been issued and she said he had not and that she had not heard from him since that time. Bill stated that appellant received the job offer on October 30, 2000 (but signed it October 29, 2000 based on the return receipt), and appellant did not return the signed job offer to the employing establishment until December 1, 2000. He stated that Ms. Young called appellant on December 1, 2000 to discuss the job and told him to report to work that evening and that his supervisor would be notified. Bill stated that the amended job offer was received by appellant on November 6, 2000 based on the return receipt.

By decision dated January 4, 2001, the Office terminated appellant's compensation benefits effective January 4, 2001 on the grounds that appellant refused an offer of suitable work.

By letter dated February 13, 2001, appellant requested reconsideration of the Office's decision. Appellant stated that he felt there had "been a lack of communication, and a great deal of confusion on [his] part, as to when [he] was suppose to return to work." He stated that he had "been told different things by different people." Appellant stated that he was not aware of a return date until he contacted the nurse assigned to his case, Linda Fuller. He said he then called his supervisor about returning to work and was told not to return until he was cleared by an employing establishment doctor. Appellant stated that he called the medical unit in Oakland and they were unsure about the steps he needed to take, and he called the Oakland Office and was told they needed to check on it. He stated that he got a call from the supervising nurse at the Oakland medical unit stating that he could return to work the night of January 5, 2001 which he did. Appellant stated that he also received a letter from the claims examiner, Bill Wong, saying that his compensation would end on January 4, 2001. He stated that he "truly believed" he was going back to work at the right time, and that if he returned at the wrong time, it was due to a lack of understanding.

In a memorandum dated March 26, 2001, Ms. Young stated that there was no lack of communication by the employing establishment relating to appellant's obligation to work. She stated that two formal job offers were made to appellant, one on October 30, 2000 and an amended one on November 2, 2000. She stated that when she received appellant's acceptance on December 1, 2000, she called appellant to discuss the job offer, the proposed duties and the fact that the physical requirements had been amended. Ms. Young stated that appellant asked her when he should return to work and she told him that he was expected to return to work when the job was initially offered but no later than when he received the job offer in the mail on October 30, 2000. Ms. Young stated that she instructed appellant to return to work that evening, December 1, 2000. She told him that she would call his supervisor to inform him of his return to work that night, and that all appellant had to do was return to work. She told him that he did not

require a medical clearance as he was already medically cleared for the job. Ms. Young stated that on December 13, 2000, Mr. Wong called her to ask if appellant had returned to work, and after checking the payroll records and contacting his supervisor, she learned he had not returned to work. She stated that the Office subsequently sent out the letter to respond to the job offer in 15 days but appellant did not respond.

By letter dated April 8, 2001, appellant reiterated that he contacted his supervisor and was told he could not return to work until he was cleared by an employing establishment doctor. He stated that he contacted the medical unit and they were unsure as to what procedures he needed to go through to return to work, and the medical unit contacted the Oakland Office but they were also unsure of what he should do, and the medical unit told him they would contact him when they found out. Appellant stated that when the medical unit did contact him, they told him that he could return to work without the clearance and he did.

In a report dated February 28, 2001, which was received by the Office on April 13, 2001, Dr. Jensen performed a physical examination and reviewed x-rays. He diagnosed that appellant had a recurrent rotator cuff test of his right shoulder and had developed impingement in his left shoulder after years of not being able to use his upper extremity. Dr. Jensen stated that a magnetic resonance imaging scan and arthrogram should be obtained to assess the integrity of his supraspinatus tendon. He stated that appellant had been working in a modified work capacity with the restrictions of no use of the arm for pushing or pulling and no repetitive lifting of the right upper extremity for packages greater than the limit. Dr. Jensen stated that “this apparently is making his shoulders worse.” He stated that he would like to amend his work restrictions and change appellant’s lifting capacity to a limit of no greater than 10 pounds with the right upper extremity.

By decision dated April 13, 2001, the Office denied appellant’s request for modification.

The Board finds that the Office properly terminated appellant’s compensation benefits effective January 4, 2001 for refusal of suitable work.

Once the Office accepts a claim, it has the burden of justifying termination of modification of compensation benefits by establishing that the accepted disability has ceased or that it is no longer related to the employment.¹ This burden of proof is applicable when the Office terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work. Under this section 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 The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee’s entitlement to compensation based on a refusal to accept a suitable offer of employment and, for this reason, will be narrowly construed.³ The issue of whether an employee has the physical ability to perform a modified position offered

¹ *H. Adrian Osborne*, 48 ECAB 556 (1997); *David W. Green*, 43 ECAB 883 (1992).

² 5 U.S.C. § 8106(c)(2).

³ *See Susan L. Dunnigan*, 49 ECAB 267 (1998); *Stephen R. Lubin*, 43 ECAB 564 (1992).

by the employing establishment is primarily a medical question that must be resolved by the medical evidence.⁴

In this case, appellant was informed in writing by the employing establishment on October 30, 2000, and the Office on November 2 and December 13, 2000 that he was being made a job offer to which at the latest he was required to respond by December 28, 2000 (*i.e.*, within 15 days of the December 13, 2000 letter). Appellant accepted the October 30, 2000 job offer and the Office received his acceptance on December 1, 2000. In the March 26, 2001 memorandum, Ms. Young stated that she called appellant on December 1, 2000 and told appellant that he should return to work that evening, that she would inform his supervisor of his return to work, that the job description had been amended to fit his physical restrictions and he did not require a medical clearance as he was already cleared. The January 4, 2001 Office note of "Bill" corroborates that Ms. Young called appellant on December 1, 2001 and told him to report to work that evening.

Appellant's contentions in his request for reconsideration and in his April 8, 2001 letter that his supervisor told him he required a clearance from the employing establishment to return to work, that two medical units were unsure of the procedure and when one of them finally contacted him on January 5, 2001 telling him he could return to work, he did. Appellant attributed his misunderstanding about his return to work date to miscommunication. Appellant's assertions, however, lack credibility since he received the three formal offers from the employing establishment and the Office on or about October 30, November 2 and December 13, 2000, and the Office's letters informed him that he would suffer the penalty of termination of his benefits if he did not respond. In his April 8, 2001 letter, appellant did not mention the conversation with Ms. Young. He did not provide corroborating evidence to show that he had been told that he required medical clearance and should not return to work until January 5, 2000. Since appellant did not provide a valid reason for refusing the offer of suitable work, the Office properly terminated his compensation benefits.

⁴ See *John E. Lemker*, 45 ECAB 258 (1993); *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

The decisions of the Office of Workers' Compensation Programs dated April 13 and January 4, 2001 are hereby affirmed.

Dated, Washington, DC
October 22, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member