

Appellant submitted reports from Dr. James Kipnis, a Board-certified orthopedist, dated March 20, 2002, which diagnosed shoulder impingement syndrome, low back pain and spasms and indicated that appellant was temporarily totally disabled. His report of May 18, 2002 diagnosed chronic bilateral impingement syndrome with bilateral adhesive capsulitis of the shoulders with chronic low back pain with degenerative disc disease of the lumbar spine. Dr. Kipnis advised that appellant could not return to a job which would involve overhead lifting and sitting for any prolonged period of time. In a work capacity evaluation report of the same date, he noted that maximum medical improvement had been reached and set forth the following permanent work restrictions: sitting not to exceed 4 hours; walking, standing, reaching not to exceed 2 hours; no reaching above the shoulders, twisting, squatting, kneeling or climbing; operating a motor vehicle not to exceed 2 hours; pushing more than 10 pounds not to exceed 2 hours a day; pulling more than 10 pounds not to exceed 2 hours a day; lifting more than 10 pounds not to exceed 2 hours a day; performance of repetitive movements of the wrists not to exceed 4 hours a day; performance of repetitive movements of the elbows not to exceed 4 hours a day; 15-minute breaks every 2 hours; and a working day limited to 6 hours.

On January 15, 2003 the employing establishment offered appellant a position as a modified city carrier working six hours a day from 8:00 a.m. to 2:00 p.m. The duties included casing and/or delivering express mail up to five pounds, writing return to sender mail and forwarding mail in the central mark up unit and writing up notices for the Columbia University Campus office. This job was subject to Dr. Kipnis' medical restrictions.

By letter dated January 15, 2003, the Office informed appellant that it had reviewed the position description and found the job offer suitable for his physical limitations. He was advised that he had 30 days to accept the position or provide his reasons for refusing. Additionally, the Office advised him of the statutory consequences if he refused suitable work.

By letter dated January 28, 2003, appellant declined the job offer. In a letter dated February 18, 2003, his attorney advised that he was completely and totally disabled from work. Counsel argued that the job offer required the performance of duties beyond appellant's medical restrictions and that a medical report from his treating physician would be forthcoming.

By letter dated February 26, 2003, the Office informed appellant that his refusal of the offered position was found to be unjustified. The Office indicated that the position was within the restrictions as set forth by Dr. Kipnis. The Office provided appellant 15 days to accept the job.

By decision dated April 11, 2003, the Office terminated appellant's compensation, finding that he refused an offer of suitable work.

Appellant, through counsel, requested reconsideration on May 15, 2003. Counsel challenged the suitability of the offered position and argued that the Office had taken an adversarial approach in this matter and that the medical evidence supported that appellant was disabled from the modified letter carrier position offered by the employing establishment. Appellant did not submit any additional medical evidence.

In a decision dated August 22, 2003, the Office denied appellant's reconsideration request.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation.¹ Under section 8106(c)(2) 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 To justify termination of compensation, the Office must show that the work offered was suitable³ and must inform appellant of the consequences of refusal to accept such employment.⁴ An employee who refuses or neglects to work after suitable work has been offered or secured for her has the burden of showing that such refusal or failure to work was reasonable or justified.⁵ Additionally, the employee shall be provided the opportunity to make such a showing before entitlement to compensation is terminated.⁶

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 the medical evidence.⁷ Additionally, it is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.⁸

ANALYSIS -- ISSUE 1

In this case, the Office established that the offered position of January 15, 2003 was suitable. Dr. Kipnis prepared a work restriction evaluation dated May 18, 2002 and noted that appellant could work six hours a day subject to the following restrictions: sitting not to exceed 4 hours; walking, standing, reaching not to exceed 2 hours; no reaching above the shoulders, twisting, squatting, kneeling or climbing; operating a motor vehicle not to exceed 2 hours; no pushing more than 10 pounds not to exceed 2 hours a day; pulling more than 10 pounds not to exceed 2 hours a day; lifting more than 10 pounds not to exceed 2 hours a day; performance of repetitive movements of the wrists not to exceed 4 hours a day; performance of repetitive movements of the elbows not to exceed 4 hours a day; 15-minute breaks every 2 hours; and a workday limited to 6 hours a day.

¹ *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

² 5 U.S.C. § 8106(c)(2).

³ *Arthur C. Reck*, 47 ECAB 339 (1996).

⁴ *See Maggie L. Moore*, 42 ECAB 484 (1991), *aff'd on recon.*, 43 ECAB 818 (1972).

⁵ 20 C.F.R. § 10.517 (1999).

⁶ *John E. Lemker*, 45 ECAB 258, 263 (1993).

⁷ *See Gayle Harris*, 52 ECAB 319, 321 (2001); *Maurissa Mack*, 50 ECAB 498 (1999).

⁸ *See Gayle Harris*, *supra* note 7; *Martha A. McConnell*, 50 ECAB 129 (1998).

The employing establishment offered appellant a modified city carrier position conforming to the restrictions imposed by Dr. Kipnis. The job specifically indicated that he would work from 8:00 a.m. to 2:00 p.m., Monday through Friday. The job duties consisted of casing and/or delivering express mail up to five pounds; write return to sender mail and forward mail in the central mark up unit; and write up left notices for Columbia University Campus office.

Appellant noted, in a letter dated February 18, 2003, that he was completely and totally disabled from any work at this time and that the job offer required the performance of duties beyond his medical restrictions. However, the job offer specifically delineates all the restrictions set forth by Dr. Kipnis and is in compliance with the restrictions set forth in his report dated May 18, 2002. No additional reports were submitted by Dr. Kipnis which contradicted or altered his previous restrictions or, advised that appellant's condition and residuals prevented his return to work in the modified position on January 15, 2003 when the Office notified him of the offered position and its finding that it was suitable. Dr. Kipnis did not retract his prior reports which noted that appellant could return to modified light-duty work six hours a day with the above-mentioned restrictions. Therefore, the evidence is insufficient to establish that appellant remained totally disabled due to physical limitations on lifting at the time the job was offered or at any time prior to the termination of benefits.⁹

The Office properly demonstrated that the modified position offered appellant was suitable work based on the restrictions of Dr. Kipnis at the time. The burden then shifted to appellant to show that his refusal to work in that position was justified.¹⁰

In order to properly terminate appellant's compensation under section 8106, the Office must provide him notice of its finding that an offered position is suitable and give him an opportunity to accept or provide reasons for declining the position.¹¹ The record in this case indicates that the Office properly followed the procedural requirements. By letter dated January 15, 2003, the Office advised appellant that a partially disabled employee who refused suitable work was not entitled to compensation; that the offered position had been found suitable and allotted him 30 days to either accept or provide reasons for refusing the position.

In a letter dated February 26, 2003, the Office advised appellant that the reasons given for not accepting the job offer were unacceptable. He was given an additional 15 days in which to respond. The record reflects that appellant did not respond to the Office's notice. There is, thus, no evidence of a procedural defect in this case as the Office provided appellant with proper notice. He was offered a suitable position by the employing establishment and such offer was refused. Thus, under section 8106 of the Act, appellant's compensation was properly terminated.

⁹ See *Gayle Harris*, *supra* note 7

¹⁰ See *Ronald M. Jones*, 52 ECAB 190 (2000).

¹¹ See *Maggie L. Moore*, *supra* note 4.

LEGAL PRECEDENT -- ISSUE 2

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that, a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.¹² Section 10.608(b) provides that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹³

ANALYSIS -- ISSUE 2

Appellant's May 15, 2003 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office.¹⁴ Consequently, he is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2). With respect to the third requirement, constituting relevant and pertinent new evidence not previously considered by the Office, appellant did not submit any relevant and pertinent new evidence along with his May 15, 2003 request for reconsideration. Therefore, he is not entitled to merit review of his claim under the third prong of section 10.606(b)(2). As appellant is not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2), the Board finds that the Office properly denied his May 15, 2003 request for reconsideration.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation based on his refusal of suitable work. The Board further finds that the Office properly denied appellant's request for reconsideration.

¹² 20 C.F.R. § 10.606(b)(2) (1999).

¹³ 20 C.F.R. § 10.608(b) (1999).

¹⁴ Appellant's counsel noted that the job offer did not outline the specific physical requirements of the offered position and was, therefore, invalid. Counsel also argued that the nature of the offered position required him to engage in the same repetitive, continuous exertions that caused the original injury and that the job description provided no indication as to how appellant could expect to perform the duties of the offered position in compliance with the medical restrictions. All of these statements are essentially the same arguments as those set forth in his letter dated February 18, 2003 and considered by the Office in its decision dated April 11, 2003.

ORDER

IT IS HEREBY ORDERED THAT the August 22 and April 11, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 13, 2004
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member