United States Department of Labor
Employees' Compensation Appeals Board

OWEN P. CROSSMAN, Appellant	)	
and	)	**Docket No. 04-766**
	)	**Issued: August 4, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Phoenix, AZ, Employer	)	

Appearances:
Owen P. Crossman, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On January 28, 2004 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated January 31, 2003 terminating his wage-loss compensation based upon his refusal of suitable work. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the termination decision.

ISSUE

Whether the Office properly terminated appellant's wage-loss compensation under 5 U.S.C. § 8106(c), effective January 31, 2003, based on his refusal to accept suitable employment.

FACTUAL HISTORY

On December 21, 1990 appellant, then a 47-year-old postal clerk, filed a claim alleging that he sustained the condition of carpal tunnel syndrome during the performance of his federal duties of data entry. Appellant stopped work on December 21, 1990 and has not returned. The Office accepted the condition of carpal tunnel syndrome with authorized surgical release. The

record indicates that the Office had previously accepted a right shoulder and cervical strain arising from a September 7, 1969 traumatic injury and appellant underwent an authorized arthroscopic debridement of the right shoulder on September 23, 1991. The Office eventually placed appellant on the periodic rolls and paid appropriate compensation benefits. On October 14, 1992 appellant was convicted of a Class 2 Felony of sexual conduct with a minor and sentenced to prison until June 1, 2006. Appellant was incarcerated on October 14, 1992.

In a June 25, 2002 report, Dr. Mark E. Frankel, a Board-certified orthopedic surgeon and second opinion physician, reviewed the medical record and statement of accepted facts and noted the results of his physical examination. Dr. Frankel noted that appellant had undergone arthroscopic surgery for a right shoulder injury and currently had restriction in the range of motion with continued pain. Dr. Frankel noted that appellant had a history of carpal tunnel surgery on the right with satisfactory relief. A positive Tinel's sign and numbness or decreased sensation in the left index finger was noted with no accompanying weakness or atrophy. He recommended that appellant be periodically evaluated for carpal tunnel on the left side. He further recommended that appellant undergo a nerve conduction velocity in both wrists.

In a July 22, 2002 letter, the employing establishment forwarded Dr. Frankel a copy of a proposed job assignment and duties. The position required appellant to push a button approximately 10 to 24 times in an 8-hour period to electronically open a gate for postal and mail trucks at a warehouse type facility. The physical requirements of the position were lifting 0-1 pounds; intermittent sitting 0 to 8 hours per day; standing and walking as desired; no climbing, kneeling, bending, stooping or twisting; pull/pushing 0 to .25 hours per day (button and doors); simple grasping 0 to .50 hours per day (paper, pen, pencil); no fine manipulation and no reaching above shoulder. The position was self-paced and contained no repetitive motions. On July 26, 2002 Dr. Frankel opined that the proposed job duties were within appellant's physical abilities.

On August 20, 2002 the employing establishment offered appellant the position as a modified mail handler which was available on September 7, 2002 at its Priority Mail Facility in Phoenix, Arizona. A copy of the employing establishment's correspondence to Dr. Frankel was attached.

On September 3, 2002 appellant advised that there were a few problems with being able to accept employment at the present time. Appellant stated that he had retired from the employing establishment and he was a distribution clerk when he retired, not a mail handler. He stated that this was a change of craft. He noted that, although he did not know who Dr. Frankel was, a doctor had come to the prison twice, the last time about six weeks ago, and he was told that his condition was worse than it was five years ago. He further stated that the offered job was over 130 miles away from his new residence in Overgaard, Arizona. Appellant also advised that he was in prison and, as he would not get out until June 1, 2006, he would only be able to start working after June 1, 2006.

By letter dated December 20, 2002, the Office advised appellant that it found the modified mail handler position suitable to his capabilities and was currently available. 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. In an attached memorandum, the Office addressed appellant's September 3, 2002 response to the offered position. The Office found that appellant was not retired from the employing establishment and had been in receipt of compensation for temporary total disability since August 16, 1991. The evidence of record established that Dr. Frankel had reviewed the proposed job offer and had opined that the work duties were in compliance with appellant's physical abilities. Thus, the position of modified mail handler was in accordance with appellant's current medical restrictions. The Office further found that the fact appellant was in prison and the offered position was over 130 miles from his new residence were not acceptable reasons for refusal of the offered position.

In a January 17, 2003 letter to the Office of Personnel Management, appellant requested his regular retirement because his compensation was being terminated due to the fact that he was unable to accept the offered position.

By decision dated January 31, 2003, the Office terminated appellant's compensation benefits effective that date finding appellant refused suitable work and had offered no evidence or argument in response to the notice of suitability.

On appeal appellant expressed his disagreement with the December 20, 2002 suitability determination.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened before it may terminate or modify compensation benefits.[1] This burden of proof is applicable if the Office terminates compensation, under 5 U.S.C. § 8106(c), for refusal to accept suitable work.[2]

Under section 8106(c)(2) of the Federal Employee's Compensation Act,[3] the Office may terminate compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[4] However, to justify such termination, the Office must show that the work offered was suitable and inform the employee of the consequences of a refusal to accept such employment.[5] Section 8106(c) will be narrowly construed as it serves as a penalty provision which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[6]

---

[1] *Linda D. Guerrero*, 54 ECAB ___ (Docket No. 03-267, issued April 28, 2003).

[2] *Juan A. Dejesus*, 54 ECAB ___ (Docket No. 03-1307, issued July 16, 2003).

[3] 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8106(c)(2).

[4] *Sandra K. Cummings*, 54 ECAB ___ (Docket No. 03-101, issued March 13, 2003); *Martha A. McConnell*, 50 ECAB 129, 131 (1998).

[5] *See Gloria J. Godfrey*, 52 ECAB 486 (2001).

[6] *Id.*

Section 10.516 of the Code of Federal Regulations states that the Office will advise the employee that the work offered is suitable and provide 30 days for the employee to accept the job or present any reasons to counter the Office's finding of suitability.[7] Thus, before terminating compensation, the Office must review the employee's proffered reasons for refusing or neglecting to work.[8] If the employee presents such reasons and the Office finds them unreasonable, the Office will offer the employee an additional 15 days to accept the job without penalty.

ANALYSIS

The Board notes that section 8106(c) of the Act is a penalty provision which relates to the termination of wage-loss compensation based on the refusal to accept an offer of suitable work. This is in contrast with section 8148 of the Act, which was enacted by Congress on September 30, 1994 to provide for the termination of benefits payable to beneficiaries who have been convicted of defrauding the compensation program or imprisoned as the result of a felony conviction.[9] The Office's procedure manual provides that, in cases involving convictions for felonies unrelated to claims under the Act, but which result in imprisonment, the claims examiner is to suspend or adjust compensation benefits effective the date of imprisonment.[10] The penalty for being incarcerated for a felony unrelated to claims under the Act, is found at section 10.18(a) of the implementing federal regulation, which provide: "Whenever a beneficiary is incarcerated in a State or Federal jail, prison, penal institution or other correctional facility due to a State or Federal felony conviction, he or she forfeits all rights to compensation benefits *for the period of his or her incarceration*."[11] (Emphasis added.) The Office did not base its January 31, 2003 decision on section 10.18(a) of the regulations. Rather, it applied the penalty provisions of section 8106(c) of the Act, finding that appellant refused to accept suitable work. The Office claims examiner applied the penalty provision of section 8106(c) instead of following the appropriate procedures implemented under section 8148.[12]

Furthermore, the Board notes that appellant, in his letter of September 3, 2002, had specifically advised the Office that he was in prison and would not be able to work until after June 1, 2006, the date his prison term ended. The Office, however, rejected appellant's reasons for refusing the job solely on the basis that it was personal. The Board notes that evidence of record established that appellant had been incarcerated since October 14, 1992 and was sentenced to remain in prison until June 1, 2006. The Office apparently never considered how appellant's prison term affected his availability for work before June 1, 2006 or the application

[7] 20 C.F.R. § 10.516.

[8] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[9] 5 U.S.C. § 8148.

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims *Disallowances*, Chapter 2.1400.12e(2) (March 1997). *See* 5 U.S.C. § 8148(b).

[11] *Id*. at § 10.18(a).

[12] *See Lucille A. Pettaway*, 55 ECAB ___ (Docket No. 03-1533, issued January 8, 2004).

of section 10.18(a) of its regulations.[13] As the Office improperly applied section 8106(c), it did not meet its burden of proof to terminate appellant's compensation benefits.

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation benefits effective January 31, 2003.

ORDER

IT IS HEREBY ORDERED THAT the January 31, 2003 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 4, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[13] 20 C.F.R. § 10.18(a).