United States Department of Labor
Employees' Compensation Appeals Board

KAY A. SMITH, Appellant	)	
and	)	**Docket No. 04-217**
	)	**Issued: June 28, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Tacoma, WA, Employer	)	

Appearances:
Kay A. Smith, 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
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On November 3, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated February 24, 2003, terminating her compensation for refusing suitable work and denying a schedule award. She also appealed from a nonmerit decision dated September 17, 2003 denying reconsideration of the merits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation benefits on the grounds that she refused an offer of suitable work; (2) whether the Office properly denied appellant's claim for a schedule award due to her accepted employment injury; and (3) whether the Office properly denied appellant's request for reconsideration of the merits on September 17, 2003.

FACTUAL HISTORY

On April 14, 1999 appellant, then a 61-year-old rural mail carrier, filed a notice of occupational disease alleging that on December 30, 1998 she became aware of injuries to her hand, wrist, arm and shoulder. Appellant first related these conditions to her employment duties on April 13, 1999. The Office accepted her claim for bilateral wrist strain and strain of the right shoulder on May 28, 1999. The Office expanded the claim to include a capsular tear on August 30, 1999. Appellant underwent authorized right shoulder surgery on September 8, 1999.

Appellant returned to light-duty work on January 24, 2000 increasing to four hours a day. She received wage-loss compensation from the Office for the remaining four hours.

The Office informed appellant of the requirements for a schedule award by letter dated March 19, 2001. In a letter dated April 20, 2001, she requested permission to seek a permanent impairment evaluation and requested a schedule award on August 27, 2001.

The employing establishment offered appellant a light-duty position on June 29, 2001 working eight hours a day. Appellant's attending physician, Dr. John Wheaton, reviewed the position on July 31, 2001 and found that appellant could perform the duties of the offered position. In a letter dated August 8, 2001, the Office informed appellant that the position was suitable and allowed her 30 days to accept the position. Appellant accepted the position on August 22, 2001 but alleged this was under duress. She retired on September 14, 2001. In a letter dated September 17, 2001, the Office informed appellant that her retirement was not an acceptable reason for refusing the suitable work position and allowed her 15 days to accept the position. By decision dated February 8, 2002, the Office terminated appellant's compensation benefits on the grounds that she refused suitable work and further found that she was not entitled to a schedule award.

Appellant requested a review of the written record on March 1, 2002 by decision dated February 24, 2003, the hearing representative found that the Office had properly terminated appellant's compensation benefits as she refused suitable work and that therefore the Office properly denied her claim for a schedule award.

Appellant requested reconsideration on August 4, 2003 and did not submit argument or evidence. By decision dated September 17, 2003, the Office declined to reopen appellant's claim for consideration of the merits.

LEGAL PRECEDENT -- ISSUE 1

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[1] As the Office in this case terminated appellant's compensation under 5 U.S.C. § 8106(c), the Office must establish that appellant refused an offer of suitable work. Section 8106(c) of the Federal Employees' Compensation Act[2] provides that a partially disabled employee who refuses or neglects to work after suitable

[1] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[2] 5 U.S.C. § 8106(c)(2).

work is offered to, procured by, or secured for the employee is not entitled to compensation. Section 10.517 of the applicable regulation[3] provides that an employee who refuses or neglects to work after suitable work has been offered or secure 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 showing before a determination is made with respect to termination of entitlement to compensation. To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[4]

ANALYSIS -- ISSUE 1

Appellant's attending physician, Dr. Wheaton, found that appellant could return to work four hours a day with restrictions beginning December 21, 1999. He indicated on March 14, 2000 that he believed that appellant should be able to return to full duty with restrictions on May 1, 2000. In a report dated April 27, 2000, Dr. Wheaton indicated that appellant could work only four hours a day based on her report of pain. On June 15, 2000 he repeated his restrictions and recommended that appellant seek additional consultation.

On September 27, 2000 the Office referred appellant for a second opinion evaluation with Dr. Scott Linden, who reported on October 20, 2000 that appellant could work four hours a day with restrictions.

Dr. Wheaton concluded that appellant's condition was permanent and recommended a permanent position of working four hours a day with restrictions on December 7, 2000. The employing establishment formulated a light-duty position on June 29, 2001 which provided for work eight hours a day with restrictions. The employing establishment requested that Dr. Wheaton review this position and opine whether it was within appellant's work capabilities. On July 31, 2001 Dr. Wheaton found that appellant could perform the duties assigned. The medical evidence, therefore, establishes that the offered position was suitable as appellant's attending physician opined that the duties were within her abilities.

The Office informed appellant that the limited-duty position was suitable on August 8, 2001 and informed her of the penalty provision of section 8106 of the Act. On August 22, 2001 appellant accepted the position but noted that her acceptance was under duress. On September 14, 2001 appellant retired from the employing establishment. Retirement is not considered an acceptable reason for refusing a suitable work position.[5] The Office properly informed appellant of this fact on September 17, 2001 and allowed her 15 days to accept the position. Appellant refused to do so and the Office properly found that she had refused an offer of suitable work on February 8, 2002.

[3] 20 C.F.R. § 10.517(a).

[4] *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

[5] *Stephen R. Lubin*, 43 ECAB 564, 569 (1992).

LEGAL PRECEDENT -- ISSUE 2

The Office's regulation provide that in termination under section 8106(c) of the Act[6] a claimant has no further entitlement to compensation under sections 8105, 8106 and 8107[7] of the Act which includes payment of continuing compensation for permanent impairment of a scheduled member.[8] The Board has found that a refusal to accept suitable work constitutes a bar to receipt of a schedule award for any impairment which may be related to the accepted employment injury.[9]

ANALYSIS -- ISSUE 2

Appellant requested a schedule award due to her accepted right shoulder conditions on August 27, 2001. The Office did not issue a final decision addressing appellant's entitlement to a schedule award prior to the February 8, 2002 termination decision finding that appellant refused an offer of suitable work. In that decision, the Office further found that as a consequence of refusing a suitable work position, appellant was not entitled to payment of a schedule award due to any permanent impairment of her upper extremity. The Board has held that termination of compensation under section 8106(c) for refusal of suitable work serves as a bar to receipt of schedule award compensation for any period after the termination decision has been reached.[10] However, this does not mean that a claimant is entitled to no benefits at all under section 8107 of the Act for the period prior to the termination. The Office has the obligation upon return of the case record, to develop the claim under 8107 in order to determine the date-of-maximum medical improvement and to determine appellant's possible entitlement to benefits pursuant to the schedule award which may have arisen prior to the Office's termination under section 8106.[11]

LEGAL PRECEDENT -- ISSUE 3

The Office's regulation provides that a timely request for reconsideration in writing may be reviewed on its merits if the employee has submitted evidence or argument which shows that the Office erroneously applied or interpreted a specific point of law; advances a relevant legal argument not previously considered by the Office, or constitutes relevant and pertinent new evidence not previously considered by the Office.[12]

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[6] 5 U.S.C. § 8106(c).

[7] 5 U.S.C. §§ 8105, 8106, 8107.

[8] 20 C.F.R. § 10.517.

[9] *Stephen R. Lubin, supra* note 5 at 573.

[10] *Pete F. Dorso*, 52 ECAB 424, 428 (2001).

[11] *Stephen R. Lubin, supra* note 5 at 573.

[12] 5 U.S.C. §§ 10.609(a) and 10.606(b).

ANALYSIS -- ISSUE 3

In this case, appellant requested reconsideration of the Office's February 24, 2003 decision on August 4, 2003. Appellant did not submit new evidence and did not offer any argument in support of her request. As appellant's request for reconsideration failed to include evidence or argument which shows that the Office erroneously applied or interpreted a specific point of law; failed to advance a relevant legal argument not previously considered by the Office, nor contained relevant and pertinent new evidence not previously considered by the Office properly declined to reopen appellant's claim for consideration of the merits in its September 17, 2003 decision.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits as she refused an offer of suitable work. The Board further finds that as appellant refused an offer of suitable work under section 8106(c) of the Act she was not entitled to continuing schedule award benefits. However, the Board notes that the Office should evaluate appellant's claim to determine whether she had any entitlement to a schedule award prior to the termination of the compensation benefits under section 8106. The Board also finds that the Office properly declined to reopen appellant's claim for consideration of the merits on September 17, 2003.

ORDER

IT IS HEREBY ORDERED THAT the September 17 and February 24, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 28, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member