United States Department of Labor
Employees' Compensation Appeals Board

FREDDIE L. TOWNER, JR., Appellant	)	
and	)	**Docket No. 04-1605**
	)	**Issued: October 7, 2004**
U.S. POSTAL SERVICE, ATLANTA AIR MAIL CENTER, Atlanta, GA, Employer	)	

Appearances:
Freddie L. Towner, Jr., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On June 8, 2004 appellant filed an appeal of a decision of the Office of Workers' Compensation Programs dated April 12, 2004, which terminated his compensation benefits and his entitlement to a schedule award on the grounds that he refused an offer of suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation effective April 12, 2004 on the grounds that he refused an offer of suitable work.

FACTUAL HISTORY

On November 14, 2002 appellant, then a 44-year-old clerk, filed a claim for a traumatic injury occurring on November 6, 2002 in the performance of duty. The Office accepted his claim for right shoulder strain, thoracic sprain and a consequential injury of left shoulder

tendinitis. He stopped work on November 8, 2002 and returned to work on November 13, 2002. Appellant had intermittent periods of disability following his employment injury.

On July 17, 2003 Dr. William M. Craven, a Board-certified orthopedic surgeon, performed a repair of a retorn right rotator cuff with a decompressive acromioplasty and debridement of bone spurs. In a work capacity evaluation dated August 19, 2003, Dr. Craven opined that appellant could return to work for eight hours per day with no lifting of the right and left arms. In an unsigned progress report dated August 20, 2003, Dr. Craven found that appellant could perform work without any overhead lifting of more than five pounds. He further noted that appellant should avoid repetitive work.[1]

Appellant returned to work following the surgery on September 21, 2003 but stopped work after three days and did not return.

In progress reports dated October 22, 2003, Dr. Craven diagnosed a left shoulder rotator cuff tear and bilateral tendinitis of the elbow. He found that appellant could work with no overhead lifting and no lifting more than five pounds.[2] In a report dated November 19, 2003, Dr. Craven found that appellant could resume his regular employment.

On December 29, 2003 the Office referred appellant to Dr. Harold Alexander, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated January 13, 2004, he discussed appellant's history of injury and listed detailed findings on physical examination. Dr. Alexander diagnosed him as "status post rotator cuff tear of his right shoulder with repair and acromioplasty and biceps tenodesis." He found that appellant had pain and diminished range of motion of the left shoulder due to residuals of his November 6, 2002 employment injury. Dr. Alexander stated:

> "[Appellant] cannot perform his regular duties as a postal clerk … but can do light duty which would involve lifting without elevating his arms beyond 40 degrees and sitting, standing, walking and bending. I do not think that [appellant] can go back to lifting up to 70 [pounds] on a regular basis overhead or even intermittently. [He] is capable of performing a modified light[-]duty position full time."

In an accompanying work capacity evaluation, Dr. Alexander found that appellant could sit, walk and stand 6 to 8 hours per day, reach below the shoulder 2 hours per day, twist and operate a motor vehicle at work 4 hours per day, perform repetitive movements of the wrist and elbows 2 to 4 hours per day, push, pull and lift 10 to 20 pounds 4 hours per day and squat and kneel 1 hour per day. He found that appellant could not climb, reach above the shoulder or perform any overhead work.

[1] Dr. Craven provided substantially similar unsigned progress reports dated September 8 and 19 and October 8, 2003.

[2] Dr. Craven submitted similar reports on November 26 and December 15, 2003 and January 5, 2004.

On January 26, 2004 the employing establishment offered appellant a position as a modified parcel post distribution machine operator beginning January 28, 2004.[3] The employing establishment included a description of appellant's job duties, the physical requirements of the position and the location of the job.

In a letter dated February 4, 2004, the Office advised appellant that it had found the position of modified parcel post distribution machine operator suitable and notified him that if he refused the offered position without reasonable cause, his compensation benefits would be terminated pursuant to 5 U.S.C. § 8106(c). The Office informed appellant that the position remained open and that he would be compensated for any difference in pay between the offered position and his date-of-injury job. The Office provided him 30 days to accept the position or offer reasons for his refusal.

In a form report dated February 19, 2004, Dr. Craven indicated that appellant could lift and carry up to 20 pounds, push and pull up to 30 pounds 3 times per hour and reach above his shoulder with a maximum of 5 pounds 3 times per hour.[4]

On March 4, 2004 the employing establishment advised the Office that appellant had not yet reported for duty.

By letter dated March 19, 2004, the Office notified appellant that the medical evidence from Dr. Craven did not show that he was unable to do the offered job. The Office provided appellant with an additional 15 days to accept the position and noted that it would not consider any further reasons for refusal.

In a decision dated April 12, 2004, the Office terminated appellant's compensation benefits effective April 12, 2004 and his entitlement to a schedule award because he refused an offer of suitable work.[5]

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation, including cases in which the Office terminates compensation under section 8106(c) for refusal to accept suitable work.[6]

---

[3] Appellant underwent a functional capacity evaluation at the request of Dr. Craven on January 20, 2004 which showed that he could perform light work, lifting up to 20 pounds occasionally.

[4] In an unsigned progress report dated February 2, 2004, Dr. Craven noted that appellant's condition was unchanged and that he could perform light work.

[5] A finding that appellant refused suitable work under section 8106(c) bars further compensation for disability due to an accepted employment injury, including compensation granted under 5 U.S.C. § 8107 for a schedule award. 5 U.S.C. § 8106(c)(2); 20 C.F.R. 10.517(b); *Stephen R. Lubin*, 43 ECAB 564 (1992).

[6] 5 U.S.C. § 8106(c); *Henry W. Sheperd, III*, 48 ECAB 382 (1997).

Under section 8106(c)(2) of the Federal Employees' Compensation Act,[7] 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.[8] However, to justify such termination, the Office must show that the work offered was suitable[9] and must inform the employee of the consequences of a refusal to accept employment deemed suitable.[10] An employee who refuses to work or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified.[11] 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.[12]

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.[13] Thus, before terminating compensation, the Office must review the employee's proffered reasons for refusing or neglecting to work.[14] 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.[15]

ANALYSIS

The Board finds that the Office properly determined the position offered by the employing establishment on January 26, 2004 was within appellant's work restrictions. Dr. Craven, appellant's attending physician, opined in a progress note dated October 22, 2003 that he could work with no overhead lifting or lifting over five pounds. In a report dated November 19, 2003, he found that appellant could resume his regular employment.[16] The Office referred him to Dr. Alexander for a second opinion evaluation. On January 13, 2004 he found that appellant could work for eight hours per day with prohibitions on overhead work, reaching over the shoulders and climbing. Dr. Alexander further limited appellant to reaching below the

[7] 5 U.S.C. § 8106(c)(2).

[8] *See Martha A. McConnell*, 50 ECAB 129, 131 (1998).

[9] *See Marie Fryer*, 50 ECAB 190, 191 (1998).

[10] *See Ronald M. Jones*, 48 ECAB 600, 602 (1997).

[11] 20 C.F.R. § 10.517; *Ronald M. Jones*, *supra* note 10.

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

[13] 20 C.F.R. § 10.516.

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

[15] 20 C.F.R. § 10.516.

[16] The reports of Dr. Craven dated August 20, September 8 and 19, October 8, November 26 and December 15, 2003 and January 5 and February 2, 2004 are of no probative value as they are not signed. *Merton J. Sills*, 39 ECAB 572 (1988).

shoulder 2 hours per day, performing repetitive wrist and elbow movements 2 to 4 hours per day, pushing, pulling and lifting up to 20 pounds 4 hours per day, squatting and kneeling 1 hour per day and twisting and operating a motor vehicle 4 hours per day. Appellant's limitations were specifically incorporated into the January 26, 2004 offer of employment. The medical evidence of record thus, establishes that, at the time the job offer was made, appellant was capable of performing the modified position.[17] The burden then shifted to him to show that his refusal to work in that position was justified.[18]

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.[19] The Board finds that the record establishes that the Office properly followed the procedural requirements. By letter dated February 4, 2003, the Office advised appellant that a partially disabled employee who refused suitable work was not entitled to compensation and that the offered position had been found suitable. He was notified of the penalty provisions of section 8106 and allotted 30 days to either accept or provide reasons for refusing the position. Appellant submitted a duty status report from Dr. Craven, who found that he could lift and carry up to 20 pounds, push and pull up to 30 pounds and reach above the shoulder with a maximum of 5 pounds. Dr. Craven's work restrictions are within the physical requirements of a modified parcel post distribution machine operator and thus, do not establish that appellant did not have the capability to perform the offered position.

In a letter dated February 19, 2004, the Office advised appellant that he had not provided acceptable reasons for refusing the job offer and provided him an additional 15 days to respond. The Board finds that, as the Office provided appellant with proper notice, the record contains no procedural deficit. He was offered a suitable position by the employing establishment, but did not return to work. The Office, therefore, properly terminated appellant's compensation under section 8106.

On appeal appellant alleges that he has depression. The Office must consider preexisting and subsequently acquired conditions in evaluating the suitability of an offered position.[20] However, in this case there is no medical evidence of record documenting the condition of depression existing before or arising after appellant's employment injury.

[17] *See Deborah Hancock*, 49 ECAB 601 (1998).

[18] *See Ronald M. Jones*, *supra* note 10.

[19] *See Maggie L. Moore*, *supra* note 14.

[20] *See Gayle Harris*, 52 ECAB 319 (2001).

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation, including his entitlement to a schedule award[21] on the grounds that he refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 12, 2004 is affirmed.

Issued: October 7, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[21] *See supra* note 5.