

the aisle.² The Office accepted the claim for aggravation central disc herniations and lumbar strain. Appellant stopped work on July 23, 1994 and returned to limited-duty work on December 14, 1994. He sustained intermittent periods of disability due to his accepted employment injury subsequent to December 14, 1994.

Appellant was reemployed as a modified clerk on October 31, 1994 and the Office issued a loss of wage-earning capacity decision on January 27, 1995.

Appellant filed claims for recurrences of disability beginning March 20 and June 12, 1995, which the Office accepted.³ The Office subsequently placed him on the automatic rolls for temporary total disability.

In an August 18, 1995 report, Dr. Demosthenes D. Dasco, an attending Board-certified neurologic surgeon, diagnosed chronic low back syndrome. A physical examination revealed 45 degrees forward bending, minimal muscle spasm and no significant weakness in the legs. The physician noted that appellant's "neurologic findings have not changed since" August 1994 and that he was discharging him from his care. Lastly, he concluded that appellant was not capable of returning to work.

In a March 9, 1996 report, Dr. Walter D. Carver, a second opinion Board-certified orthopedic surgeon, diagnosed slight to moderate degenerative preexisting cervical spine arthritis, preexisting and progressive moderately advanced lumbar spine degenerative arthritis, excess weight, heart condition with three heart attacks, diabetes and probable intervertebral disc disorder at L5 and S1. A physical examination of the back revealed 10 degrees flexion, 5 degrees extension, 15 degrees lateral bending, 20 degrees twisting "with no pain on simulated rotation," 40 degrees for straight leg raising in the supine position and 80 degrees for straight leg raising in a sitting position. Dr. Carver opined that appellant was capable of working in a sedentary position on a part-time basis with restrictions. The restrictions included no lifting more than 5 pounds and the ability to change his position or rest every 15 minutes.

On February 9, 1996 the employing establishment offered appellant the part-time position of modified distribution clerk. Duties of the position included boxing and casing mail within his restrictions, nixie mail, computerized forwarding system (CFS) mail, verifications, financial activities and other duties the supervisor may assign. The physical restrictions of the position required no lifting more than 5 pounds, light sedentary part-time work and the opportunity to change his position or rest every 15 minutes.

In a February 23, 1996 note, Dr. C. Richard Seiler, an attending physician, opined that appellant was unable to work in any capacity at the employing establishment due to his medical problems.

² The record contains evidence that appellant sustained an employment injury on December 17, 1987 which the Office accepted for a lumbar strain.

³ The Office of Personnel Management (OPM) approved appellant's application for disability retirement by letter dated October 26, 1995.

By letter dated February 26, 1996, the Office informed appellant that the modified distribution clerk position offered to him was suitable to his work capabilities. The Office informed him that he had 30 days in which to contact the employing establishment regarding the enclosed job offer. The Office further explained that, if appellant did not accept the position or provide an explanation for refusing it, the Office would issue a final decision terminating compensation and he would not be entitled to any further compensation for wage loss or schedule award.

In a letter dated March 4, 1996, appellant's counsel requested a copy of Dr. Carver's report for his review to assist appellant in responding to the proposed job offer.

In a March 18, 1996 letter, the Office determined that the limited-duty position constituted a suitable job offer and instructed appellant that he had 15 days in which to accept the job offer or compensation payments would be terminated under 5 U.S.C. § 8106(c).

In a March 27, 1996 report, Dr. Seiler reported that appellant had multiple health problems including diabetes, severe coronary artery disease, moderately severe hypertension and pain due to a herniated disc. Dr. Seiler stated that he had reviewed the offered job position and concluded that appellant was medically incapable of performing any of the duties of the position. The physician noted that appellant cannot drive to work due to his severe back pain and "prolonged sitting causes sciatica pain with neurologic problems as well as his preexisting neuropathy from his diabetes."

On June 26, 1998 the Office terminated appellant's wage-loss compensation benefits based upon his refusal of an offer of suitable work.⁴

Appellant's counsel requested an oral hearing in a letter dated July 14, 1998. A hearing was held on November 19, 1998 at which appellant was represented by counsel, provided testimony and submitted evidence.

In a decision dated February 11, 1999, the hearing representative found the job offer made by the employing establishment failed to comply with the Office requirements as it failed to include a detailed description of appellant's medical restrictions. The hearing representative also determined that there was an unresolved conflict in the medical opinion evidence between Drs. Dasco and Seiler, appellant's attending physicians, and Dr. Carver, an Office referral physician, regarding the suitability of the offered position. Thus, the hearing representative set aside the June 24, 1998 decision.

On March 23, 1999 the Office referred appellant to Dr. Joseph S. Sadowski, a Board-certified neurological surgeon, to resolve the conflict in the medical opinion evidence regarding the suitability of the offered position.

⁴ In a cover letter dated June 24, 1998, the Office informed appellant that his benefits had been terminated effective June 24, 1998. However, the front page of the decision noted the date of the decision as June 26, 1998 and ordered benefits be terminated effective June 26, 1998.

In an April 24, 1999 report, Dr. Sadowski, based upon a review of the statement of accepted facts, medical reports and a physical examination, concluded:

“[Appellant] has a 30 [percent] permanent partial disability of his low back as a result of his two work-related injuries of 1987 and 1989. A greater portion of his disability is due to his heart diseases, obesity and diabetes. As a result of his diabetes he most likely has diabetic neuropathy involving his lower extremities which is causing his (sic) a great deal of problems.”

Dr. Sadowski opined that appellant “should be capable of performing the job offered,” but doubted he would “ever return to work because of his other ongoing problems.”

On June 10, 1999 the Office placed appellant on the automatic rolls for temporary total disability effective May 23, 1999.

In a June 30, 1999 report, Dr. Dasco diagnosed chronic low back syndrome with right-sided radiculopathy. A physical examination revealed forward bending to 40 degrees, minimal muscle spasm, minimal weakness of the right foot extensor hallucis longus muscle and straight leg raising to 70 degrees which produced pain radiating into the right leg. He concluded that appellant is totally disabled due to his July 22, 1994 employment injury.

In a July 8, 1999 work capacity evaluation form (OWCP-5c), Dr. Sadowski indicated that appellant could only work four hours due to medical problems besides his back condition. Physical restrictions included no pushing, lifting, pulling, squatting, kneeling and climbing and a 15-minute break.

In a supplemental report dated July 14, 1999, Dr. Sadowski stated that he saw “no reason why [appellant] is not capable of driving this short distance for any physical reasons” and that he is capable of taking other available transportation. Lastly, he concluded appellant had a 15 percent disability due to his 1994 employment injury.

In a September 20, 1999 letter, the Office requested that Dr. Sadowski clarify appellant’s lifting restriction as he noted that appellant was capable of lifting for zero hours, but in his report indicated that appellant was capable of lifting up to five pounds.

In a May 15, 2000 report, Dr. Dasco concluded that appellant was totally disabled.

On May 17, 2000 the employing establishment offered appellant the position of modified distribution clerk. The physical requirements of the part-time position included no lifting more than 5 pounds; intermittent standing and sitting for not more than 1 hour; no pushing, pulling, squatting, climbing or kneeling; and a 15-minute break every 2 hours. The duties of the position included boxing and casing mail, nixie mail, CFS mail, financial activities, UBB mail verifications; and other duties as may be assigned by the supervisor.

By letter dated May 23, 2000, the Office advised appellant that the position of modified distribution clerk was suitable as it was consistent with appellant’s medical restrictions. The Office advised appellant that the job remained open and he had 30 days to either accept the

position or provide a reasonable explanation for refusing the offer. He was advised that his compensation would be terminated if he refused the job offer without reasonable cause.

In a July 6, 2000 work capacity evaluation form (OWCP-5c), Dr. Dasco indicated that appellant was totally disabled from any work. He reported low back pain which radiates into the right leg, a mild limp on the right side, bending to 45 degrees and “weakness of EHL on right side.”

By letter dated June 22, 2000, appellant’s counsel requested the medical evidence upon which the Office determined the suitability of the offered position. He noted that the position description was not specific enough and failed to comply with the Office’s procedures.

In a June 27, 2000 letter, the Office forwarded a December 10, 1999 report by Dr. Sadowski in which he stated that appellant could perform the offered position. The Office, in a separate letter dated June 27, 2000, advised appellant that the position offered to him was consistent with the medical restrictions contained in the medical evidence of record and no contrary medical evidence had been submitted by him. The Office advised appellant that his compensation would be terminated within 15 days if he refused the job offer or failed to report for duty. Appellant was advised that his entitlement to medical benefits remained.

Appellant refused the position on July 8, 2000.

In a July 13, 2000 letter, appellant’s counsel requested all copies of correspondence between the Office and Dr. Sadowski.

By decision dated July 18, 2000, the Office terminated appellant’s wage-loss compensation on the basis that he refused an offer of suitable work.

Appellant’s counsel requested an oral hearing by letter dated July 20, 2000.

In a decision dated November 14, 2000, the hearing representative found Dr. Sadowski’s opinion insufficient to resolve the conflict in the medical opinion evidence as the opinion was internally inconsistent and not well reasoned. She, therefore, set aside the decision terminating appellant’s wage-loss compensation and remanded the case to the Office for further action.

On June 25, 2002 the Office referred appellant to Dr. Jonathan Ballon, a Board-certified neurological surgeon, to resolve the conflict in the medical opinion evidence between Drs. Dasco and Seiler, appellant’s treating physicians, and Dr. Carver, an Office referral physician, regarding appellant’s ability to perform the duties of the position of modified distribution clerk.

In a June 25, 2002 report, Dr. Dasco reported that appellant had diabetic neuropathy and low back pain radiating into the right leg. A review of a March 20, 2000 magnetic resonance imaging (MRI) scan revealed L5-S1 right side disc herniations. Physical findings included a 45 degree forward bending with pain radiating into the right leg, slightly decreased sensory to pinprick in both feet, right side straight leg raising to 60 degrees with pain radiating into the leg. Dr. Dasco concluded that appellant was totally disabled from any work due to his medical problems.

In a July 31, 2002 report, Dr. Ballon, based upon a review of a statement of accepted facts, medical evidence and a physical examination, diagnosed chronic low back syndrome which was not totally disabling. A medical history revealed that appellant “has been in very poor health for many years, mostly from his own doing.” He reported medical problems including chronic obstructive pulmonary disease due to his smoking, obesity, insulin dependent diabetes, coronary artery disease, hypertension, hypercholesterolemia and diabetic neuropathy. Physical findings revealed forward bending limited to 30 degrees, some difficulty with heel and toe walking, “left patellar reflex is 1+; the right patellar reflex and both Achilles reflexes are absent,” diminished sensation to pinprick in both legs, and “[p]itting edema and chronic venous stasis changes are noted in both legs.” Regarding appellant’s disability, Dr. Ballon concluded:

“This man has a chronic low back syndrome, which in my opinion, should not render him totally disabled; indeed [appellant] gave me the distinct impression that he is at least as much disabled as a result of his peripheral neuropathy and edema -- clearly not work-related conditions -- as he is because of his back problems.”

The physician opined that the primary cause of appellant’s disability was his “general disregard for his own health.” In concluding, Dr. Ballon opined that appellant’s back condition did not prevent him from performing the duties of the offered position of modified distribution clerk.

By decision dated August 27, 2002, the Office terminated appellant’s wage-loss compensation benefits effective that date, finding that he refused to work after a suitable job offer was made. In reaching this decision, the Office relied upon the report of Dr. Ballon, the impartial medical examiner.

In a letter dated September 23, 2002, appellant, through his counsel, requested an oral hearing. A hearing was held on April 3, 2003 at which appellant was represented by counsel, allowed to testify and submitted evidence.

In a report dated March 21, 2003, Dr. C. Richard Seiler, appellant’s attending physician, noted that appellant had several serious illnesses including diabetes, coronary artery disease, depression and severe low back pain due to disc herniations. He opined that these conditions had worsened since the July 22, 1994 employment injury, “their associated medications require constant follow up and reassessment also prevent appellant from any form of work.”

By decision dated August 15, 2003, the Office hearing representative found that appellant refused an offer of suitable work and affirmed the termination of his wage-loss compensation benefits.

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.⁵ As the Office in this case terminated

⁵ *Linda D. Guerrero*, 54 ECAB ____ (Docket No. 03-267, issued April 28, 2003).

appellant's compensation under section 8106(c) of the Act, the Office must establish that appellant refused an offer of suitable work. Section 8106(c)(2) provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to compensation."⁶ Section 10.517(a) of the applicable regulation⁷ provides that, an employee who refuses or neglects to work after suitable work has been offered or secured by the employee, has the burden of showing that such refusal or failure to work was reasonable or justified and, pursuant to section 10.516, shall be provided with the opportunity to make such a 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.⁸ According to Office procedures, certain explanations for refusing an offer of suitable work are considered acceptable.⁹

In addition, Chapter 2.814.11 of the Office's procedure manual contains provisions regarding the modification of a formal loss of wage-earning capacity. The relevant part provides that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has changed; or (3) the claimant has been vocationally rehabilitated. Office procedures further provide that the party seeking modification of a formal loss of wage-earning capacity decision has the burden to prove that one of these criteria has been met. If the Office is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved or that the claimant has been vocationally rehabilitated.¹⁰

ANALYSIS

In the instant case, the Office accepted an aggravation of central disc herniations and lumbar strain due to the July 22, 1994 employment injury and that appellant had sustained an earlier lumbar strain on December 17, 1987. The issue is whether the position of modified distribution clerk is suitable considering his employment injury as well as any health conditions which predated the employment injury or arose subsequent to the employment injury.¹¹ The evidence of record establishes that he has a variety of health conditions which are unrelated to his accepted employment injury. These conditions include diabetes, severe coronary artery disease, hypertension, obesity, chronic obstructive pulmonary disease and diabetic neuropathy in his legs, arthritis in his cervical and lumbar spine and hypercholesterolemia. Appellant's diabetes, cervical and lumbar spine arthritis predated his employment injury.

⁶ 5 U.S.C. § 8106(c)(2).

⁷ 20 C.F.R. § 10.517(a).

⁸ *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(1)-(5).

¹⁰ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11 (July 1997).

¹¹ *Gayle Harris*, 52 ECAB 319 (2001).

In considering whether appellant was capable of performing the position of modified distribution clerk parttime, Dr. Ballon opined that his accepted employment-related back condition did not render him incapable of performing this position. The physician also opined that appellant's current disability resulted from his other medical conditions which he attributed to appellant's "general disregard for his own health." Dr. Ballon, in his report, diagnosed chronic low back syndrome, chronic obstructive pulmonary disease, obesity, insulin dependent diabetes, coronary artery disease, hypertension, hypercholesterolemia and diabetic neuropathy. In reaching his conclusion that appellant was capable of performing the offered position, he failed to consider the impact of appellant's nonemployment-related health conditions when determining the suitability of the position offered by the employment establishment. Dr. Ballon specifically stated that appellant was capable of performing the duties of the offered position based upon the accepted employment injury. However, the physician stated that appellant was as much disabled by his nonemployment conditions of peripheral neuropathy and edema.

In determining the suitability of a position, the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.¹² The Office relied upon the opinion of Dr. Ballon, who was selected to resolve the conflict in the medical opinion evidence between Drs. Dasco and Seiler, appellant's treating physicians and Dr. Carver with regards to appellant's capability of performing the position of modified distribution clerk, in terminating his compensation for refusal of a suitable position. However, Dr. Ballon failed to consider appellant's preexisting and subsequently acquired conditions in finding that, appellant was capable of performing the position of modified distribution clerk. He specifically found that appellant was not disabled due to his back condition. As noted above, the Office must consider preexisting conditions in its determination of the suitability of a position. In this case, that would include consideration of appellant's preexisting diabetes, coronary artery disease and hypertension conditions as well as his subsequently acquired conditions of chronic obstructive pulmonary disease, obesity, hypercholesterolemia and diabetic neuropathy. Thus, Dr. Ballon's opinion is insufficient to resolve the conflict in the medical opinion evidence regarding the suitability of the modified distribution clerk as the physician did not consider appellant's preexisting and subsequently acquired medical conditions in his determination that appellant was capable of performing the duties of the position.

As the record contains no medical opinion finding appellant capable of performing the offered position in light of all his disabilities, preexisting and subsequently acquired, the Office improperly determined that the offered position was suitable and thus, improperly terminated appellant's wage-loss compensation.

Furthermore, it is well established that there are procedural requirements that are attached to the provisions of section 8106(c). Essential due process principles require that a claimant have notice and an opportunity to respond prior to termination under section 8106(c).¹³ The Office did not follow these procedures and, therefore, did not afford appellant the protections set

¹² *Id.*

¹³ *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992). *See also* 20 C.F.R. § 10.516 which codifies the procedures set forth in *Moore*.

forth in *Moore*.¹⁴ Subsequent to the November 14, 2000 hearing representative's decision setting aside the termination of appellant's compensation, the Office did not give appellant a reasonable opportunity to accept the offer of employment, notify him of the penalty provision of 5 U.S.C. § 8106(c) or properly considered any reasons for refusing. Prior to issuing its August 27, 2002 decision terminating compensation for refusing an offer of suitable work, the Office did not issue appellant a 30-day letter informing him that the position was suitable, that it was still available and allow him the opportunity to either accept the position or provide an explanation for refusing or extend him a letter advising him that he had 15 days to accept the offer.¹⁵

The record contains no evidence that the Office followed any of the established procedures subsequent to the November 14, 2000 hearing representative's decision and prior to the August 27, 2002 decision which terminated appellant's compensation for refusing an offer of suitable work. Appellant was not provided notice or an opportunity to respond with respect to a determination that he neglected suitable work.¹⁶

Moreover, the Office did not act in accordance with its procedures which specifically address cases where a claimant stops work after reemployment. In the present case, the Office issued a formal loss of wage-earning capacity decision on January 27, 1995 and the Office subsequently placed him on the automatic rolls for temporary total disability. Office procedures specifically provide that a decision effectuating a termination of compensation based on refusal of an offer of suitable work should not be issued in a case in which claimant stops work after the issuance of a formal loss of wage-earning capacity decision or where a claimant has retired following a formal loss of wage-earning capacity decision.¹⁷ The Office did not address its prior formal loss of wage-earning capacity decision or otherwise modify this loss of wage-earning

¹⁴ *Id.*

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, 2.814.4(c) (July 1997); *see also Linda Hilton*, 52 ECAB 476 (2001).

¹⁶ *Joan F. Burke*, 54 ECAB ____ (Docket No. 01-39, issued February 14, 2003). (In order to properly terminate appellant's compensation under 5 U.S.C. § 8106(c), 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); *Juan A. Dejesus*, 54 ECAB ____ (Docket No. 03-1307, issued July 16, 2003) (essential due process principles require that a claimant have notice and an opportunity to respond prior to termination under section 8106(c)).

¹⁷ *See Sharon C. Clement*, 55 ECAB ____ (Docket No. 01-2135, issued May 18, 2004) (the Board reversed the Office's decision terminating appellant's compensation based on her refusal of a job on the grounds that it failed to follow its procedures which address cases where a claimant stops work after reemployment. In this case, the Board noted that appellant had retired following the issuance of a formal loss of wage-earning capacity decision and Board precedent establishes that this decision remains undisturbed unless appropriately modified).

capacity decision, which was in place at that time that it made its suitable work determination.¹⁸ As the Office has not appropriately modified appellant's formal loss of wage-earning capacity decision, the suitable work termination is not appropriate.¹⁹

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation pursuant to 5 U.S.C. § 8106(c)(2), 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 August 15, 2003 is reversed.

Issued: September 29, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

¹⁸ The Board has previously addressed instances in which formal loss of wage-earning capacity decisions remain undisturbed unless modified in accordance with the above-described criteria. In *Wallace D. Ludwick*, 38 ECAB 176 (1986), the Office issued a formal loss of wage-earning capacity decision, in which it determined that the employee's wage-earning capacity was represented by the position of deputy, a position which he had been performing. The Office then terminated the employee's compensation based on his refusal of a job, which had been offered by the employing establishment and determined by the Office to be suitable. The Board reversed the Office's termination indicating that the loss of wage-earning capacity decision had not been modified and that the employee's refusal of the offered position was justified by the work, which had been determined to represent his wage-earning capacity.

¹⁹ *Wallace D. Ludwick*, *supra* note 18.