United States Department of Labor
Employees' Compensation Appeals Board

FELIPE RUIZ, Appellant	)	
and	)	**Docket No. 04-726**
	)	**Issued: September 29, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Milwaukee, WI, Employer	)	

Appearances:
Felipe Ruiz, pro se
Office of the 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 December 29, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decisions dated December 15, 2003, which denied his request for a hearing, and a decision dated October 20, 2003, terminating benefits based on his refusal of suitable work. Under 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 properly terminated appellant's compensation benefits effective October 20, 2003, on the grounds that he refused an offer of suitable work; and (2) whether the Office properly denied appellant's request for an oral hearing by an Office hearing representative.

FACTUAL HISTORY

On February 21, 2002 appellant, a 44-year-old automation clerk, injured his back and shoulder while lifting heavy equipment. He filed a claim for benefits on February 22, 2002

which the Office accepted for cervical muscle strain. Appellant was off work until April 15, 2002, when he was released to full duty. He missed work periodically from June 28 though July 14, 2002. On July 15, 2002 appellant filed a second traumatic injury claim based on the same part of the body he injured in February 2002. The Office accepted this claim for cervical radiculopathy and herniated disc at C5-6. On November 15, 2002 the Office, noting the similarity of the two injuries pertaining to the separate claims, combined the two claims. Appellant has not returned to work since July 19, 2002. The Office placed him on the periodic rolls on December 1, 2002.

The Office authorized posterior decompression surgery, which appellant underwent on February 24, 2003. A laminectomy of C3 through C6, a foraminotomy of C3 through C6, C3 through C6 fusion and lateral mass screw fixation was performed by Dr. Dennis Maiman, Board-certified in neurosurgery.

In a report dated June 23, 2003, Dr. David DeDianous, Board-certified in physical medicine and appellant's attending physician, indicated that he had "released" appellant to return to sedentary duty for four hours per day.

On July 28, 2003 in accordance with the recommendation of Dr. DeDianous, the employing establishment offered appellant a limited-duty, sedentary position as a modified mail processing clerk. The position included the performance of such duties as casing mail into pigeon holes, which could be done sitting or standing and below shoulder level; lifting handfuls of mail from a case and placing mail in trays for dispatch; and lifting empty trays, which could be done below shoulder level. The job entailed restrictions of no pushing or pulling exceeding 10 pounds; no lifting above the shoulder; standing, walking and sitting not exceeding 4 hours a day, with frequent position changes and mixing of activities.

By letter dated August 7, 2003, appellant indicated his reasons for rejecting the job offer. He asserted that he was physically unable to perform the duties of the position because he could not keep his head erect or stand for prolonged periods without experiencing pain. Appellant also alleged that he was unable to engage in repetitive movements. He signed his rejection on a copy of the job offer on August 12, 2003.

By letter dated August 12, 2003, the Office advised appellant that a suitable position was available and that pursuant to section 8106(c)(2), he had 30 days to either accept the job or provide a reasonable, acceptable explanation for refusing the offer. The Office advised appellant that it would terminate his compensation if he refused to accept the position as a modified mail processing clerk for four hours per day. The Office noted that Dr. DeDianous, the attending physician, had approved the suitability of the position.[1]

By letter dated September 22, 2003, the Office advised appellant that he had 15 days in which to accept the position or it would terminate his compensation. He did not respond within 15 days.

[1] 5 U.S.C. § 8106(c)(2).

By decision dated October 20, 2003, the Office terminated appellant's compensation benefits on the grounds that he refused an offer of suitable work. The Office noted that he did not submit any evidence to contest the suitability of the four-hour job offered on July 28, 2003 and did not begin work pursuant to the July 28, 2003 offer.

In a letter postmarked November 20, 2003, appellant requested an oral hearing.

In a decision dated December 15, 2003, the Office found that appellant's request for an oral hearing was untimely filed. The Office noted that his request was postmarked November 20, 2003, which was more than 30 days after the issuance of the Office's October 20, 2003 decision and that he was, therefore, not entitled to a hearing as a matter of right. The Office nonetheless considered the matter in relation to the issue involved and denied appellant's request on the grounds that the issue was factual and medical in nature and could be addressed through the reconsideration process by submitting additional evidence.

LEGAL PRECEDENT -- ISSUE 1

Section 8124(b) of the Federal Employees' Compensation Act, concerning a claimant's entitlement to a hearing before an Office representative states: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[2]

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and the Office must exercise this discretionary authority in deciding whether to grant a hearing.[3]

ANALYSIS -- ISSUE 1

Appellant's hearing request, which was postmarked November 20, 2003, was made more than 30 days after the date of the issuance of the Office's October 20, 2003 decision. Therefore, the Branch of Hearings and Review was correct in finding that appellant's request for a hearing was untimely and he was not entitled to a hearing as a matter of right. The Branch of Hearings and Review, however, exercised its discretionary powers in denying appellant's request for a hearing and in so doing, did not act improperly. The Branch noted that the issue in the case was factual and medical in nature and appellant could submit additional evidence to the Office with a request for reconsideration.

[2] 5 U.S.C. § 8124(b).

[3] *Samuel R. Johnson*, 51 ECAB 612 (2000).

LEGAL PRECEDENT -- ISSUE 2

Under section 8106(c)(2) of the Act[4] 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.[5] Section 10.517(a) of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered to or secured has the burden of showing that such refusal or failure to work was reasonable or justified.[6] Section 10.517(b) states that the Office will terminate the employee's compensation after providing two notices, one for 30 days and one for 15 days, as described in section 10.516.[7] To justify termination, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[8]

ANALYSIS -- ISSUE 2

The initial question in this case is whether the Office properly determined that the position was suitable. The determination of whether an employee is physically capable of performing the job is a medical question that must be resolved by medical evidence.[9] Dr. DeDianous stated in his June 23, 2003 report, that appellant could return to sedentary work for four hours per day. Based on his report, the employing establishment offered him a limited-duty, sedentary position as a modified mail processing clerk. The position entailed duties such as casing mail into pigeon holes, lifting handfuls of mail from a case, placing mail in trays for dispatch and lifting empty trays which could be done below shoulder level. The job allowed appellant to sit, stand or walk at his discretion and to diversify his activities in order to accommodate his condition; it allowed him to refrain from activities which could aggravate his cervical condition such as pushing or pulling exceeding 10 pounds and lifting above the shoulder.

The light-duty position, which the Office advised appellant on August 12, 2003 was suitable work, did meet his physical restrictions as outlined by Dr. DeDianous, his treating physician. At the time of the suitable work offer there was no medical evidence to the contrary, indicating that appellant could not perform this position. The burden then shifted to appellant to show that his refusal to work in that position was justified. While he refused the job offer noting that he did not believe he could perform the duties of the position, appellant never submitted any

[4] 5 U.S.C. § 8101 *et seq*.

[5] *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987).

[6] 20 C.F.R. § 10.517(a).

[7] 20 C.F.R. § 10.516 states that the Office shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter the Office's finding of suitability. If the employee presents such reasons and the Office determines that the reasons are unacceptable, it will notify the employee of that determination and that he has 15 days in which to accept the offered work without penalty.

[8] *See John E. Lemker*, 45 ECAB 258 (1993).

[9] *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

further evidence. The Office properly advised appellant by letter dated August 12, 2003, that the position was found suitable and allowed him 30 days to accept the position or his compensation would be terminated. He was further advised by letter dated September 22, 2003, that he had 15 days to accept the position or his compensation would be terminated. No evidence to contest the suitability determination was submitted.

The Board finds that the Office complied with its procedural requirement in advising appellant that the position was found suitable and providing him with the opportunity to accept the position or provide his reasons for refusing. The record reflects that appellant did not respond to the Office's notice; therefore, he failed to submit any evidence to show that the offered position was not medically suitable.[10]

CONCLUSION

The Board finds that the Office properly denied appellant's request for a hearing and met its burden in terminating his compensation benefits on the grounds that he refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the December 15 and October 20, 2003 decisions of the Office be affirmed.

Issued: September 29, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

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