United States Department of Labor
Employees' Compensation Appeals Board

CHARLES W. LUND, Appellant	)	
and	)	**Docket No. 04-898**
	)	**Issued: September 27, 2004**
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATIONADMINISTRATION, Anchorage, AL, Employer	)	

Appearances:
Hugh W. Fleischer, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On February 19, 2004 appellant filed a timely appeal from a January 21, 2003 merit decision of the Office of Workers' Compensation Programs terminating his compensation benefits on the grounds that he refused an offer of suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the case.

ISSUE

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

FACTUAL HISTORY

On November 30, 1999 appellant, then a 52-year-old manager of international operations and programs, filed a traumatic injury claim alleging that on November 26, 1999 he slipped and fell in the parking lot of an airport while in the performance of duty. The Office accepted the

claim for a concussion and chipped tooth and later expanded this to include post-concussion syndrome.[1] Appellant stopped work on November 26, 1999.[2]

Appellant came under the care of Dr. William H. Ragle, a Board-certified internist, for treatment of his work injury. In reports dated December 22, 1999 to September 5, 2000, Dr. Ragle opined that appellant was totally disabled for regular duty and diagnosed concussion, post-concussion syndrome, short-term memory problems, difficulty concentrating, post-concussion sleep disturbance and post-traumatic stress disorder. On April 5, 2000 he advised that appellant was unable to return to work due to cognitive and memory dysfunction, significant sleep disturbance and chronic headaches. Other reports from Dr. Majorie Smith, a Board-certified psychiatrist and neurologist, dated March 7, 2000 to May 21, 2001, diagnosed status post-closed head injury, post-concussion syndrome, migraine with aura, adjustment disorder with depressed mood and post-traumatic stress disorder. She opined that appellant's problems with attention, concentration, multi-tasking, short-term memory, were all secondary to his work-related post-concussion syndrome. In reports dated January 8, May 21 and June 13, 2001, she advised that appellant sustained no residual neurological deficits or cognitive impairments and opined that appellant was competent to return to work. Appellant also sought treatment from Dr. Cleve R. Shirey, a Board-certified psychiatrist and neurologist, from October 19, 2000 to September 26, 2001, who diagnosed major depressive disorder, single episode, pain disorder, primary insomnia and nightmare disorder and opined that these conditions were a direct result of appellant's fall in November 1999. Appellant was treated by Dr. Paul L. Craig, a psychologist, from January 25, 2000 to January 25, 2001, who diagnosed post-concussion syndrome with mild to moderate dementia due to a closed-head injury, mood disorder and major depressive episode and advised that appellant's neurocognitive deficits would make it difficult for him to return to employment.

On April 16, 2001 the employing establishment offered appellant a full-time position as a aviation safety inspector. The physical requirements of the position included developing training for field inspectors on technical subjects and performing normal office duties.

By letter dated May 17, 2001, the Office informed appellant that it had reviewed the position description and found the job offer suitable with his physical limitations. Appellant was advised that he had 30 days to accept the position or offer his reasons for refusing. He was apprised of the penalty provision of the Federal Employees' Compensation Act if he did not return to suitable work.

On June 19, 2001 the Office referred appellant to Dr. Charles Perkins, a Board-certified neurologist, for a second opinion evaluation. In a report dated August 15, 2001, Dr. Perkins, discussed appellant's work history and noted that he experienced short-term memory loss, dementia and headaches. The diagnosis was post-concussion syndrome versus depression and

[1] Appellant filed a traumatic injury claim on March 25, 1998 alleging that he sustained multiple contusions of the head and neck on March 16, 1998 while in the performance of duty, claim No. 14-0315566. The Office accepted claim No. 14-0315566 and consolidated that case with the current case on appeal before the Board.

[2] The record reflects that on January 23, 2004 appellant accepted the October 7, 2002 job offer as an aviation safety inspector and returned to work. He filed the current appeal to the Board on February 19, 2004.

headaches, possibly vascular in nature. Dr. Perkins noted that appellant's neurological evaluation was within normal limits and failed to show any residual memory or cognitive deficit. He opined that appellant could return to a position as an aviation safety inspector. He noted that appellant sustained minimal head trauma and opined that appellant's symptomology was due to his depression and pseudo dementia and not to the post-concussion syndrome. In a nurse closing report dated July 26, 2001, Carol Jacobsen, R.N., advised that appellant had been released to work by Drs. Craig and Smith.

On July 26, 2001 the Office referred appellant to Dr. Ronald Feigin, a Board-certified psychiatrist, for a second opinion evaluation. In a report dated August 27, 2001, Dr. Feigin, discussed appellant's history of work injury and reviewed the medical records provided to him. He noted that appellant experienced a head trauma with significant changes in cognitive functioning which had improved; however, he still experienced symptoms of depression, anxiety, migraine headaches, amnesia and nightmares. The physician diagnosed depression, pain disorder associated with psychological factors, nightmare disorder, post-concussion syndrome, cognitive disorder resolved, migraine headaches, psychosocial and environmental problems of stress secondary to physical employment and financial concerns. Dr. Feigin determined that appellant had work-related residuals of anxiety and depression. He noted on the work capacity evaluation that appellant could return to work subject to the following restrictions: self-paced work to allow avoidance of deadline pressure, he would be permitted a later start time, he would have a gradual introduction to increasing work demands, appellant would be able to work on his own and if he experienced headaches, he would be permitted to go to a quiet dark room.

In an email dated January 8, 2002, the employing establishment advised the Office that it could accommodate Dr. Feigin's work restrictions by providing appellant with self-paced work to allow avoidance of deadline pressure which would include working on long-term projects with the time lines of approximately 1 to 12 months, he would not travel and would not be assigned flight check type work until he was returned to a normal work schedule. The employing establishment further noted that appellant would be permitted a later start time and could request a flexible work schedule from Monday through Friday with core hours of 9:00 a.m. to 3:00 p.m. In addition appellant would have a gradual introduction to increasing work demands and would be placed on light-duty status to accommodate his limitations and accommodate gradually increasing work hours. Appellant would also be able to work on his own and would be provided with an individual workspace and cubicle. Finally, if appellant experienced headaches, he would be permitted to go to a quiet dark room.

In a letter dated January 24, 2002, Dr. Feigin reviewed the accommodations set forth by the employing establishment on January 8, 2002 and advised that the work schedule was reasonable as long as appellant was provided with ongoing therapy and extra support and could gradually return to full-time work.

Appellant submitted reports from Dr. Shirey dated June 26 and September 3, 2002, who opined that appellant could return to work as an aviation safety inspector initially working two hours per day and increasing his hours monthly until achieving an eight-hour day.

On October 7, 2002 the employing establishment offered appellant a full-time position as an aviation safety inspector. The requirements of the position incorporated the recommendations of Drs. Feigin and Shirey and specifically noted that appellant's job included self-paced work, a later start time, a gradual introduction to increasing work demands, he would work on his own and, if he experienced headaches, he would be permitted to go to a quiet dark room.

In a letter dated October 30, 2002, the Office advised appellant that the job offer constituted suitable work. Appellant was informed that he had 30 days to either accept the position or provide an explanation of the reasons for refusing it; otherwise, he risked termination of his compensation.

In a letter dated November 7, 2002, appellant refused the position and requested that he be reemployed in his date-of-injury position.

By letter dated December 9, 2002, the Office advised appellant that it reviewed appellant's reason for refusal of the offered position and found that it was not justified. The Office noted that the employing establishment was not required to reemploy appellant in his date-of-injury position. Appellant was advised that the light-duty position was found to constitute suitable work and he was given an additional 15 days to accept the job offer without penalty.

In an email dated December 17, 2002, the employing establishment responded to an Office request to clarify appellant's work schedule. The employing establishment noted that it would accommodate appellant's return to work by permitting him to work between 6:00 a.m. and 6:00 p.m., Monday through Friday, which would allow him flexibility in starting later and to gradually increase his work hours. The employing establishment set forth appellant's schedule and noted that, in month one, he would work two hours per day; in month two, three hours per day; in month three, four hours per day; in month four, five hours per day; in month five, six hours per day; in month six, seven hours per day; and in month seven, eight hours per day.

By letter dated December 18, 2002, appellant, through his attorney, again requested that appellant be reemployed in his date-of-injury position. He submitted a note from Dr. Shirey dated December 4, 2002, which advised that the job offer of October 7, 2002 did not incorporate his recommendations that appellant gradually return to work over a seven-month period.

By letter dated December 30, 2002, the Office advised appellant the position of an aviation safety inspector was suitable work and he was provided 15 days to accept the job offer. The Office noted that Dr. Shirey's recommendations were incorporated in the job offer. The job offer was revised to specifically detail a gradual return to work starting in month one for two hours per day, month two for three hours per day, month three for four hours per day, month five for six hours per day, month six for seven hours per day and month seven for eight hours per day. Appellant did not accept the job offer.

By decision dated January 21, 2003, the Office terminated appellant's compensation, finding that he refused an offer of suitable work.

LEGAL PRECEDENT

Section 8106(c)(2) of the Act states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for him is not entitled to compensation.[3] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.[4] In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.[5]

ANALYSIS

The Office based its finding that the aviation safety inspector position was suitable on the August 27, 2001 report of the second opinion physician, Dr. Feigin and the reports of appellant's treating physician, Dr. Shirey, dated June 26 and September 3, 2002. The physicians opined that appellant could return to self-paced work, with a later start time and a gradual introduction to work demands. Dr. Shirey agreed that a gradual return to work was appropriate where appellant would work two hours per day increasing one hour per month over a seven-month period. After appellant refused the position because it was not his date-of-injury job, on December 9, 2002 the Office issued a letter advising that the reasons for refusal were not justified and provided him 15 days to accept the job.

On December 17, 2002 the Office determined that further clarification was required of Dr. Shirey. Dr. Shirey noted that the job offer of October 7, 2002 did not incorporate his recommendations that appellant gradually return to work over a seven-month period.

The Office obtained clarification from the employing establishment with regard to appellant's gradual return to work under the suitable work job offer. The employing establishment noted that appellant would be permitted to work between 6:00 a.m. and 6:00 p.m., Monday through Friday and that, in month one, he would work two hours per day; in month two, three hours per day; in month three, four hours per day; in month four, five hours per day; in month five, six hours per day; in month six, seven hours per day; and in month seven, eight hours per day. In a December 30, 2002 letter to appellant, the Office noted the seven-month schedule for appellant's gradual return to full-time work as based on the recommendations of Dr. Shirey.

---

[3] 5 U.S.C. § 8106(c)(2).

[4] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

[5] *Glen L. Sinclair*, 36 ECAB 664 (1985).

After obtaining clarification of the work schedule in the job offer, the Office's December 30, 2002 letter properly extended appellant another 15 days to accept the job. The Office followed the proper procedures and afforded appellant the protections set forth in *Moore*.[6] The Office gave appellant a reasonable opportunity to accept the offer of employment, notified him of the penalty provision of section 8106(c) and properly considered his reasons for refusing the offered job. Appellant's stated objection to the job offer was not based on the schedule of work hours as designated by his physician. Rather, he noted a preference to be reemployed in his date-of-injury position. His desire to work in his date-of-injury position does not constitute a valid reason for not accepting the modified work as approved by the physicians of record. When he did not accept, the Office properly invoked the penalty provision of section 8106(c). Thus, the Board finds that the Office met its burden of proof in terminating appellant's compensation.

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's disability compensation under 5 U.S.C. § 8106(c)(2) for refusal of suitable employment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 21, 2003 is affirmed.

Issued: September 27, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

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