United States Department of Labor
Employees' Compensation Appeals Board

DERICK A. JORDAN, Appellant	)	
and	)	**Docket No. 04-646**
	)	**Issued: June 14, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Tucson, AZ, Employer	)	

Appearances:
Derick A. Jordan, 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
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On January 14, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated November 19, 2003 which terminated his wage-loss compensation under 5 U.S.C. § 8106(c) 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 wage-loss compensation entitlement under 5 U.S.C. § 8106(c) on the grounds that he refused an offer of suitable work.

FACTUAL HISTORY

The Office accepted that on November 21, 1994 appellant, then a 34-year-old part-time flexible letter carrier, sustained right knee strain and internal derangement as he was pushing an

all purpose container (APC), loading it onto a truck and felt his knee "pop."[1] The Office accepted the conditions of right knee strain with internal derangement. Appellant stopped work immediately following the incident and did not return.

By decision dated April 15, 1996, the Office terminated appellant's compensation benefits. The Office found that appellant's current medical conditions were not related to the November 21, 1994 employment injury.

Appellant disagreed and the Office, by decision dated April 25, 1996, vacated its decision finding that a conflict in medical opinion required referral to an impartial medical specialist.

By report dated June 17, 1996, Dr. Lawrence R. Houseman, a Board-certified orthopedic surgeon, provided an impartial medical examination of appellant, reviewing his medical history, presenting his findings upon examination and noting that muscularly and neurologically appellant's right leg had healed from the meniscectomy without problems. He noted that appellant "perhaps had a slight effusion" but had decreased range of right knee motion and that he guarded significantly and had extreme sensitivity to light touching of the surgical scar. Dr. Houseman reviewed the other treating physicians' notes and diagnosed internal derangement of the right knee. He noted that with appellant's decreased range of motion, which was 115 degrees of flexion and his pain with an attempted pivot shift finding related to the ACL suggested continued problems with the medial meniscectomy. Dr. Houseman opined that he did not think there was an aggravation of the preexisting injury but he recommended further surgery for a right ACL reconstruction. He opined that appellant continued to be totally disabled related to his employment.

On August 12, 1996 appellant filed a new occupational disease claim alleging that on July 19, 1996 he first became aware that he had developed low back pain, headaches, hypertension, glaucoma and a collapsing left knee injury, consequent to treatment for the November 21, 1994 employment-related injury. Appellant claimed that these conditions were as a consequence of treatment with Depo-Medrol injection into his right knee by Dr. Wang on December 12, 1994.

By Office request on November 15, 1996, Dr. John Wright Cortner, a Board-certified orthopedic surgeon, reviewed appellant's complaints and noted that appellant had an ACL tear. He opined that the onset of appellant's left knee and low back pain was not due to the November 21, 1994 injury and that the headaches, hypertension and glaucoma were also not related. Dr. Cortner opined that, when appellant's right knee was stable, the left knee and low back would feel better.

On November 27, 1996 appellant's consequential injury claim was denied. The Office found that Dr. Cortner's report constituted the weight of the medical evidence of record.

[1] Appellant had a previous right knee injury and impairment from, his military service from 1979 to 1983 and he was rated by the Department of Veterans Affairs with a 20 percent right knee disability.

On January 29, 1997 appellant requested reconsideration and in support he submitted additional medical evidence.

Appellant submitted a January 8, 1997 report from Dr. Hassman, who opined that appellant had a chronic lumbar paraspinal strain secondary to the abnormal gait which was secondary to the work-related injury.

By Office request on April 29, 1997, Dr. Bruce D. Bingham, a Board-certified orthopedic surgeon, reviewed appellant's factual and medical history, noted his presenting complaints and opined that appellant could have sustained a lumbosacral strain, but noted that there was no indication for further evaluation or treatment of a lumbosacral strain. Dr. Bingham opined that any lumbosacral strain had resolved and that there was no evidence of impairment or abnormality and he indicated that appellant could return to his usual occupation and activities without restrictions. Dr. Bingham also opined that there was no left knee condition or abnormality to explain appellant's complaints.

By decision dated May 27, 1997, the Office denied modification of the previous November 27, 1996 decision. The Office found that Drs. Cortner's and Bingham's opinions constituted the weight of the medical evidence.

By report dated July 21, 1997, Dr. Housman, a Board-certified orthopedic surgeon, opined that appellant needed surgery on his right knee. He noted that appellant had a subsequent injury to his right knee while standing on a wet floor, causing a torn right medial meniscus in 1997.[2] Dr. Wang was authorized to perform the required surgery on July 19, 1996.

Appellant relocated to the Seattle, Washington area in 1997, ostensibly due to his spouse's employment and vocational rehabilitation was begun in January 1998.[3] His first psychiatric evaluation was conducted in 1998, by the Seattle Veterans Hospital. Appellant attended Lake Washington Technical College from April 13, 1998 to September 3, 1999, in the Culinary Arts program for several semesters studying to be a hotel/restaurant chef.[4] It was determined that these jobs were in the medium category and were suitable for appellant's work restrictions.

On July 19, 1999 the employing establishment attempted to offer appellant reemployment as a part-time flexible general clerk modified at the Tucson branch. Appellant did not respond to the offer.

On August 3, 1999 the Office advised appellant of the provision of 5 U.S.C. § 8106(c)(2) and gave him 30 days within which to accept the offered position. Appellant did not promptly respond to the job offer and when he did he asked multiple questions about whether

[2] Dr. Housman opined that appellant needed right knee surgery in a previous June 17, 1986 report.

[3] The vocational rehabilitation was supposedly funded by the Department of Veterans Affairs.

[4] Appellant did not complete the program and required three more quarters to complete the requirements for a hotel/restaurant chef.

his wife qualified for relocation expenses and job searching and why he was not offered a job in the Seattle area.

On August 17, 1999 appellant requested an oral hearing on the May 27, 1997 rejection of his claim. In an August 24, 1999 response, the Office advised that the most recent decision in his case was on May 27, 1997 such that it was untimely requested.

By report dated January 25, 2000, Theodore Becker, PhD., reported on the results of a January 14, 2000 physical capacities evaluation performed on appellant.

The Office medical adviser reviewed the results of the January 14, 2000 physical capacities evaluation and activity restrictions recommended and he opined that, in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment,* (A.M.A., *Guides*) fourth edition, the job offer presented to appellant July 19, 1999 including the specific physical requirements of that job, was suitable and easily met appellant's work tolerance limitations.

By letter dated March 10, 2000, the Office advised appellant that the position being offered him by the employing establishment was found to be suitable to his partially disabled condition and his work restrictions. It advised him of the provision of 5 U.S.C. § 8106(c)(2) and gave him 30 days within which to accept the position without penalty.

By letter dated April 11, 2000, the Office advised appellant that his reasons for refusal of the light-duty position were not acceptable and it gave him 15 additional days within which to accept the job offer. Appellant did not respond within the specified time frame.

During the period January to March 2000 appellant was treated by Dr. Bradford Felker, a Board-certified psychiatrist employed by the Department of Veterans Affairs, who evaluated appellant, noted that he had a delusional belief system that the Office and the Department of Labor were in collusion against him because he was an African American and diagnosed major depression with psychotic features, significant anxiety and difficulty controlling anger and Dr. Felker recommended that appellant not take the job in Tucson.

On July 24, 2000 the Office noted that it had offered him work that was found to be suitable to his condition and that he had not accepted the position arguing that from a psychiatric standpoint he could not accept the position. The Office advised appellant that Dr. Felker had not found that appellant's psychiatric condition was work related.

His vocational rehabilitation was interrupted, however, when in 2000, appellant removed himself from the program before completion and moved to Flower Mound, Texas and was, therefore, no longer available for vocational rehabilitation. His rehabilitation case was closed effective December 8, 2000. Appellant's rehabilitation case was later transferred to Dallas, Texas.

On August 14, 2001 the Office referred appellant to Dr. Sergio Silva, a Board-certified psychiatrist, to determine whether he was capable of working and whether his emotional condition was related to his employment in any manner.

By report dated September 5, 2001, Dr. Silva, a Board-certified psychiatrist, provided a second opinion evaluation in which he examined and tested appellant, noted his threats and nonspecific homicidal ideation against the personnel at Tucson and opined: "his references to doing harm to others have a manipulative feel related to the secondary gain of ongoing medical disability benefits." Dr. Silva noted that "It is obvious to me that [appellant] is malingering these symptoms," and he found no corroboration of psychosis, no evidence of a formal thought disorder, no affective or psychomotor disturbance and no evidence that appellant met the criteria for a major mood disorder. Dr. Silva diagnosed an adjustment disorder with a depressed mood and found no psychiatric contraindications to gainful employment on a full-time basis.

By letter dated September 6, 2001, the Office advised appellant that he did not have an accepted claim for an emotional condition, nor did the evidence of record indicate that his emotional condition was related to his accepted employment injury.

Thereafter the Office reinitiated reemployment with the original employing establishment branch in Tucson. On November 23, 2001 the employing establishment again offered appellant the limited-duty position as a modified general clerk with the same duties and physical requirements as it had specified in the prior offer. The employing establishment indicated that it would reimburse him for relocating to Tucson from Flower Mound, Texas. The employing establishment clarified that reimbursement would be authorized according to the General Services Administration travel regulation governing a permanent change of duty station move.

By letter dated November 28, 2001, the Office advised appellant that he had been offered a position by the employing establishment which the Office found to be suitable to his condition and physical limitations. The Office advised appellant of the provision of 5 U.S.C. § 8016(c) and it gave him 30 days within which to accept the offered position, or to provide an explanation of why he was refusing the position.

On December 29, 2001 appellant was treated at an emergency room for depression with psychotic features which began following a November 21, 1994 incident.

By letter dated December 26, 2001, appellant refused the position and he alleged that the physical requirements were not within his capabilities. Appellant alleged that the offered position was not within his mental limitations and he complained that Dr. Silva developed an inaccurate psychiatric evaluation. Appellant claimed that the statement of accepted facts was inaccurate and that the employing establishment was attempting to force him back to Tucson. He noted that 20 C.F.R. § 10.508 provided that the employing establishment should, if possible, offer employment where the employee lives.

In a response dated January 2, 2002, the Office noted that it had considered his reasons for refusal of the offered position and found them to be without merit. It advised that appellant had 15 additional days within which to accept the position or his benefits would be terminated.

On January 15, 2002 appellant responded alleging that he had no rights and was being mistreated because he was an African American. Appellant stated, however, that he would accept the offered position as a general clerk, modified.

On February 26, 2002 appellant was again provided with a formal copy of the offered position and its physical requirements. It indicated that relocation expenses would be paid after appellant signed the reemployment agreement and initiated his return to Tucson, as the bills were submitted.

By letter dated February 28, 2002, appellant requested advanced funds to cover his expenses of the move, roundtrip airfare, lodging, meals, house hunting expenses, temporary quarters, settlement of his unexpired lease, transportation of households goods and allowances for utilities. On March 2 and 25, 2002 appellant again requested the funds to facilitate his relocation to Tucson.

On December 10, 2002 appellant was advised by the Office that reimbursement for relocation expenses was not advanced in full but was paid on a transaction-by-transaction basis and it noted that the employing establishment was unable to determine the amount to which appellant was entitled as he declined to fill out and complete the necessary forms for such monies.

Appellant accepted the position but he failed to relocate to Tucson and to report to work at the designated date and time.

By decision dated December 16, 2002, the Office terminated appellant's compensation entitlement on the grounds that he refused an offer of suitable work. The Office found that the medical evidence indicated that appellant was only partially disabled, that the position of modified general clerk was within his medical activity restrictions, that it was properly offered to him and that he was given a great deal of time to accept the position and to relocate to Tucson and that he refused to report to work as ordered.

Appellant requested an oral hearing before an Office hearing representative. The hearing was held on September 4, 2003 at which appellant testified.

By decision dated November 19, 2003, the Office hearing representative affirmed the December 16, 2002 Office decision, finding that appellant refused an offer of suitable work. The Office hearing representative found that the medical evidence indicated that appellant was only partially disabled and could work with certain activity limitations, that he was offered a position in Tucson that was found to be consistent with his physician's activity limitations and was within his ability and training, that he was afforded relocation expenses to move his family back to Tucson, but that he declined to fill out the required paperwork or answer the employing establishment's questions. The Office hearing representative found that appellant was advised that his reasons for refusal of the modified position were unacceptable and that he was given extra time to report to work, but that he did not report to work as ordered.

LEGAL PRECEDENT

Under section 8106(c)(2) of the Federal Employees' Compensation Act, 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] To justify termination of compensation, the Office must establish that the work offered was suitable.[6] Section 10.516 of Title 20 of the Code of Federal Regulations[7] provides that an employee who refuses or neglects to work after suitable work has been offered or secured 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.[8]

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.[9] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses 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.[10] 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 by appellant was suitable.[11]

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.[12] An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[13]

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[5] 5 U.S.C. § 8106(c)(2) provides in pertinent part: "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered to, procured by or secured for him; is not entitled to compensation."

[6] *David P. Camacho*, 40 ECAB 267 (1988).

[7] 20 C.F.R. § 10.516.

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

[9] 5 U.S.C. § 8106(c)(2).

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

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

[12] 5 U.S.C. § 8106(c)(2).

[13] 20 C.F.R. § 10.124.

If possible, the employer should offer suitable reemployment in the location where the employee currently resides. If this is not practical, the employer may offer suitable reemployment at the employee's former duty station or other location.[14]

ANALYSIS

In this case, the Board finds that the Office did not meet its burden of proof to terminate appellant's wage-loss compensation benefits on the grounds that he refused an offer of suitable work and/or refused to report after a suitable job had been secured for appellant.

The employing establishment offered appellant, who lived in Flower Mound, Texas, a limited-duty position as a modified general clerk in Tucson, Arizona. The Office, by letter dated November 28, 2001, found that the position was suitable and allowed appellant 30 days to accept the position or offer reasons for his refusal. By regulation, when an employee would need to move to accept an offer of reemployment, the employing establishment should, if possible, offer suitable reemployment in the location where the employee currently resides.[15] The record contains no evidence that the employing establishment made any effort to determine whether such reemployment was possible in Texas near appellant's residence. The Office, knowing that appellant would have to move back to Arizona to accept the offer, should have developed this aspect of the case before finding the offer suitable.

In 1987 the pertinent regulation applied only to former employees, employees who were terminated from the agency's employment rolls:

> "Where an injured employee relocates after having been terminated from the agency's employment rolls, the Office encourages employing agencies to offer suitable reemployment in the location where the former employee currently resides. If this is not practical, the agency may offer suitable employment at the employee's former duty station or other alternate location."[16]

The regulation in effect since 1999 contains no such restrictive language. The regulation now states that the employer "should" offer suitable reemployment where the employee currently resides, if possible.[17] Under the circumstances of this case, where appellant would need to move to accept a position in Tucson, Arizona, the Board finds that the Office should have developed the issue of whether suitable reemployment was possible in or around Flower Mound, Texas. It was reversible error for the Office to terminate appellant's compensation benefits without positive evidence showing that such an offer was not possible or practical.[18]

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[14] 20 C.F.R. § 10.508 (1999). This regulation applies to both those employees who are no longer on agency rolls and those employees who continue on the agency rolls.

[15] *See* 20 C.F.R. § 10.508; *see also Sharon L. Dean*, 56 ECAB ___ (Docket No. 04-1707, issued December 9, 2004).

[16] 20 C.F.R. § 10.123(f) (1987).

[17] 20 C.F.R. § 10.508 (1999).

[18] *See Sharon L. Dean*, *supra* note 15.

CONCLUSION

The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits 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 November 19, 2003 is hereby reversed.

Issued: June 14, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member