United States Department of Labor
Employees' Compensation Appeals Board

TRUMAN WILSON, Appellant	)	
and	)	**Docket No. 05-1185**
	)	**Issued: October 5, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Cicero, IL, Employer	)	

Appearances:
Truman Wilson, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge

JURISDICTION

On May 5, 2005 appellant filed an appeal of a July 26, 2004 and February 22, 2005 decisions of the Office of Workers' Compensation Programs, terminating his wage-loss compensation benefits on the grounds that he refused an offer of suitable work.[1] Pursuant to 20 C.F.R. § 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether the Office met its burden of proof to terminate appellant's wage-loss compensation benefits effective July 21, 2004 under section 8106(c) of the Federal Employees' Compensation Act on the grounds that he refused an offer of suitable work. On appeal, appellant contended that on July 16, 2003, he accepted a "suitable job" that had not been terminated or "closed down." He asserted that the job he rejected was "amended to the May 15, 2003 job that [he] ha[d] accept[ed]."

[1] Appellant did not appeal an April 25, 2005 schedule award decision.

FACTUAL HISTORY

The Office accepted that on June 29, 2002, appellant, a 56-year-old letter carrier, sustained a left shoulder and upper arm strain,[2] left knee strain and left medial meniscus tear when he fell through a broken wooden porch step to the ground while delivering mail. Appellant sought treatment for his left knee and shoulder from Drs. Mitchell Krieger and Victor Romano, attending Board-certified orthopedic surgeons. Dr. Romano submitted August 2002 reports diagnosing an exacerbation of a nonoccupational rotator cuff tear of the left shoulder, a frozen left shoulder and a left knee effusion.

After a period of conservative treatment, appellant underwent a left arthroscopic meniscectomy with debridement of severe chondromalacia of the trochlear notch on October 15, 2002 performed by Dr. Krieger,[3] who released appellant to restricted duty on November 18, 2002, with no lifting over 10 pounds, no kneeling, crawling or climbing and no standing for more than 30 minutes. Dr. Romano released appellant to restricted duty as of November 21, 2002, with no overhead activity and lifting limited to 20 pounds. Both physicians prescribed additional physical therapy.

On November 21, 2002 appellant claimed a schedule award for permanent impairment of the left upper and lower extremities.

On November 27, 2002 appellant accepted a temporary light-duty position working the "bang out" desk, assisting with lock boxes and at the "caller window." The record indicates that he performed this position for approximately two weeks, then stopped work and did not return.[4]

A December 12, 2002 functional capacity evaluation performed for Dr. Krieger demonstrated that appellant could perform medium to heavy work lifting up to 60 pounds, with restrictions against deep squatting, climbing straight ladders, climbing steps over 18 inches high, reaching above shoulder level with the left hand and two-handed overhead lifting. In a December 16, 2002 report, Dr. Krieger stated his agreement with the December 12, 2002 functional capacity evaluation and its restrictions.

In December 17, 2002 reports, Dr. Romano prescribed permanent restrictions of lifting limited to 35 pounds bilaterally, no lifting more than 20 pounds with the right arm and no lifting

[2] In a July 20 and 29, 2002 notes, Dr. Fredric D. Leary, an attending Board-certified family practitioner, opined that appellant reinjured a preexisting, nonoccupational rotator cuff tear in the June 29, 2002 fall. In an August 19, 2002 letter, the Office found Dr. Leary's opinion insufficient to establish a causal relationship between the diagnosed aggravation of the rotator cuff tear and the June 29, 2002 incident.

[3] Appellant received field nurse medical management services from October to December 2002

[4] On December 17, 2002 the employing establishment offered appellant a light-duty position, which the Office found not suitable. Appellant elected to receive disability retirement benefits through the Office of Personnel Management (OPM) effective December 19, 2002 through April 30, 2003. He elected to receive compensation benefits effective May 1, 2003. Appellant received compensation on the daily and periodic rolls. Appellant accepted a May 15, 2003 light-duty job offer but did not return to work. He rejected a June 18, 2003 job offer as he believed the proposed duties were not within his medical restrictions. Appellant received vocational rehabilitation services from May to December 2003.

above shoulder level using the left arm. He opined that the accepted left shoulder strain aggravated a preexisting rotator cuff tear.

In December 30, 2002 reports, Dr. Krieger explained that the work restrictions as set forth in the functional capacity evaluation were permanent. Dr. Krieger restricted "deep squatting, climbing straight ladders and over 18-inch steps, unilateral above-shoulder reaching, left knee kneeling, crawling, one-hand lifting from shoulder to overhead with the left and two-hand lifting from shoulder to overhead." He found appellant capable of medium-heavy work within the stated restrictions.

In a February 10, 2003 report, an Office medical adviser reviewed the medical record and opined that appellant had reached maximum medical improvement as of December 16, 2002. He calculated a 2 percent impairment of the left lower extremity due to limitation of flexion to 124 degrees according to Table 17-10. The medical adviser also calculated a two percent impairment of the left upper extremity due to impairment of the suprascapular nerve according to Tables 16-10 and 16-15.

In a February 25, 2003 chart note, Dr. Romano noted swelling and tenderness of the left knee and diagnosed prepatellar bursitis. He stated that appellant could "continue to work with the same restrictions as before."

A March 5, 2003 functional capacity evaluation demonstrated appellant's ability to perform medium-level work with lifting up to 55 pounds and unspecified restrictions regarding walking, stair climbing, reaching, lifting and carrying.

On December 18, 2003 the employing establishment offered appellant a modified "rehab[ilitation] carrier" position to begin December 29, 2003. The position description, dated November 17, 2003, involved sedentary, clerical duties including preparing various forms, assembling groups of 20 envelopes and sorting undeliverable mail. The physical requirements involved lifting less than 35 pounds, no overhead lifting with the left arm, no overhead lifting over 20 pounds with the right arm, no pushing or pulling, no stair climbing, standing limited to 30 minutes and "minimum walking."

Appellant rejected the offer on December 22, 2003 alleging that it was "out of [his] position" and did not sufficiently describe the proposed duties. He asserted that his doctor prescribed permanent restrictions as of December 16, 2002 and that his duties as of December 21, 2003 were "permanent disability."

In a December 31, 2003 letter, the Office advised appellant that the offered modified letter carrier position was suitable work within his medical restrictions. The Office afforded appellant 30 days in which to either accept the position or provide good cause for refusal. The Office also advised appellant that under section 8106(c) of the Act, he would lose his entitlement to compensation if he refused suitable work.

In a January 7, 2004 report, Dr. Craig Westin, an attending Board-certified orthopedic surgeon, noted assuming appellant's care following Dr. Krieger's retirement. Dr. Westin opined that appellant's left knee had "not deteriorated, nor improved, in the last [16] months." He recommended that the "same restrictions of heavy lifting, steep stairs and prolonged standing,

which were issued in 2002," be continued. Dr. Westin reiterated these restrictions in a January 27, 2004 form and found appellant permanently disabled from his "prior job."

In a January 12, 2004 note, appellant explained that he refused the offered position as it was "not in the letter carrier position and it did not outline" the entirety of the proposed duties." Appellant stated that, on January 7, 2004, one of his physicians found him disabled from "prior job."

In a May 25, 2004 letter, the Office advised appellant that his reasons for refusing the December 29, 2003 job offer were not valid. The Office explained that the offered modified carrier position was within his medical restrictions as noted by Dr. Westin and previously by Dr. Krieger. The position was also within the work tolerances demonstrated by the March 2003 functional capacity evaluation. The Office afforded appellant 15 days to accept the position or incur the termination of his compensation benefits. The Office stated that no further reasons for refusal would be considered.

By decision dated July 26, 2004, the Office terminated appellant's monetary compensation benefits effective July 21, 2004 on the grounds that he refused to accept an offer of suitable work. The Office further found that the penalty provisions of section 8106(c) of the Act served as a bar to appellant's receipt of any additional schedule award compensation. The Office found that appellant received proper notice that the offered position was suitable work. The Office further found that appellant did not provide good cause for refusing the position, which remained open and available to him. The Office further found that the position was within the restrictions prescribed on December 16, 2002 by Dr. Krieger.

Appellant elected to receive benefits through the OPM effective July 11, 2004.[5]

Appellant disagreed with the July 26, 2004 decision and on August 16, 2004 requested a review of the written record by a representative of the Office's Branch of Hearings and Review. He asserted that he rejected the November 17, 2003 job offer as it was "out of [his] position" and the employing establishment did not consider all of his accepted injuries. Appellant asserted that he was entitled to an additional schedule award for impairments of the left upper and lower extremities. He submitted additional medical evidence.

In an August 18, 2004 chart note, Dr. Westin noted that appellant's complaints of left knee pain largely unchanged since June 2004. He also noted increased left shoulder symptoms, observing "significant restriction of motion with limited elevation" and "difficulty with overhead activity." He diagnosed a patellofemoral arthrosis of the left knee by x-ray and "left shoulder rotator cuff dysfunction with probable tear" requiring further studies.

In a September 29, 2004 report, Dr. Westin provided a schedule award rating for appellant's left shoulder and left knee according to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. Dr. Westin calculated that

[5] On August 9, 2004, the employing establishment offered appellant an amended, modified position as a "rehab[ilitation] carrier" effective that date. Appellant rejected the offered position on August 25, 2004.

appellant had a 34 percent permanent impairment of the left upper extremity and a 7 percent impairment of the left lower extremity.[6]

By decision dated and finalized February 22, 2005, the Office affirmed, in part, the July 26, 2004 decision finding that the offered modified carrier position was suitable work and that appellant refused the position without good cause. The hearing representative found that Dr. Krieger's and Dr. Westin's reports established that appellant was medically capable of performing the offered position and that it was within his medical restrictions. Also, the hearing representative found that as the Office medical adviser noted a date of maximum medical improvement as December 16, 2002, prior to the July 2004 termination, the case must be remanded for additional development to determine appellant's entitlement to a schedule award. The hearing representative indicated that such development was independent of the issue of appellant's ability to perform the offered position.

On March 11, 2005 the Office referred the Office medical adviser's February 10, 2003 report for review. In a March 14, 2005 report, an Office medical adviser found no additional percentage for the left upper extremity as the rotator cuff tear preexisted the accepted injury. The Office medical adviser found a nine percent permanent impairment of the left lower extremity, two percent for the meniscectomy combined with seven percent for the diminished cartilage interval.

By decision dated April 25, 2005, the Office awarded appellant a schedule award for a two percent impairment of the left upper extremity and a nine percent impairment of the left lower extremity. The period of the award ran from December 16, 2002 through June 15, 2003. The Office noted that during this time, appellant had received total disability compensation on the periodic rolls. Thus, he was not entitled to additional compensation for that period. Also, the Office explained that appellant was not entitled to further compensation, including the schedule award, due to the sanction imposed by the July 26, 2004 decision.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[7] In this case, the Office terminated appellant's compensation under section 8106(c)(2) of the Act, which provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or

[6] Regarding the left shoulder, Dr. Westin opined that according to Figure 16-40, page 476, appellant had a 9 percent impairment of flexion. According to Figure 16-43, appellant had a 6 percent impairment of abduction with a 1 percent impairment according to Figure 16-46 for limitation of external rotation. Dr. Westin opined that appellant's "complete rotator cuff tear produce[d] the equivalent of suprascapular nerve weakness," resulting in an additional eight percent impairment for motion against gravity but not against resistance. Dr. Westin totaled these impairments to equal a 34 percent impairment of the left upper extremity. Regarding appellant's left knee, Dr. Westin found that according to Table 17-31, a 3 mm cartilage interval equaled a 7 percent impairment of the left lower extremity. He opined that appellant had reached maximum medical improvement and remained disabled from his former job as a letter carrier "because of the overhead work and the walking, including stairs, involved."

[7] *Linda D. Guerrero*, 54 ECAB ___ (Docket No. 03-267, issued April 28, 2003); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

secured for the employee is not entitled to compensation."[8] 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.[9] 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.[10]

Section 10.517(a) of the Act's implementing regulations 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.[11] Pursuant to section 10.516, the employee shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.[12]

ANALYSIS

The Office terminated appellant's monetary compensation benefits effective July 21, 2004, on the grounds that he refused a December 18, 2003 offer of suitable work. The Office found that the weight of the medical evidence established that the position was within appellant's physical capabilities. This evidence included a December 12, 2002 functional capacity evaluation performed for and reviewed by Dr. Krieger, an attending Board-certified orthopedic surgeon, demonstrated that appellant was capable of performing medium to heavy work with lifting up to 60 pounds. Appellant required permanent restrictions against deep squatting, climbing straight ladders, climbing steps over 18 inches high, reaching above shoulder level with the left arm and two-handed overhead lifting. Dr. Krieger approved and reiterated these restrictions in his December 16 and 30, 2002 reports.

Dr. Romano, an attending Board-certified orthopedic surgeon, proposed similar restrictions in a December 17, 2002 report, but restricting lifting to only 35 pounds. He renewed these restrictions on February 25, 2003. A second functional capacity evaluation, performed on March 5, 2003, demonstrated a nearly identical work capacity and restrictions.

The employing establishment's December 18, 2003 job offer of a modified "rehab[ilitation] carrier" position involved sedentary, clerical duties. The listed restrictions limited lifting to 35 pounds, no overhead lifting with the left arm, no overhead lifting over 20 pounds with the right arm, no stair climbing, standing for no more than 30 minutes and minimal walking. The Board finds that these restrictions are within the limitations set forth by Dr. Krieger and Dr. Romano, including Dr. Romano's more restrictive lifting limitation of 35 pounds. The described duties are also within the physical abilities demonstrated by both

[8] 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB ___ (Docket No. 02-66, issued February 28, 2003).

[9] *Ronald M. Jones*, 52 ECAB 190 (2000); *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

[10] *Joan F. Burke*, 54 ECAB ___ (Docket No. 01-39, issued February 14, 2003); *see Robert Dickerson*, 46 ECAB 1002 (1995).

[11] 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 9.

[12] 20 C.F.R. § 10.516.

functional capacity evaluations. Therefore, the Board finds that the position offered appellant on December 18, 2003 was suitable work within appellant's physical capabilities.

Appellant rejected the offered position on December 22, 2003, alleging that it was not within his physical restrictions and that the offer was insufficiently descriptive. He made similar assertions in a January 12, 2004 note. However, appellant did not submit any additional medical evidence supporting his assertion that he was physically unable to perform the position. He did submit January 7 and 27, 2004 reports from Dr. Westin, an attending Board-certified orthopedic surgeon, who opined that appellant's left knee condition was unchanged and that the December 16, 2002 restrictions remained appropriate. Thus, Dr. Westin's opinion tends to refute appellant's allegation that the offered position was not within his work restrictions.

Regarding appellant's assertion that the job offer did not adequately describe the proposed duties, the Board finds that the position description was sufficiently detailed to inform him of the assigned tasks. Therefore, appellant has not established sufficient cause for refusing the offered position in this regard.

The Office properly advised appellant by May 25, 2004 letter that his reasons for refusing the offered position were not valid and that he must either accept the position within 15 days or face termination of his compensation benefits. However, appellant did not accept the position prior to issuance of the July 26, 2004 decision terminating his monetary compensation. As the weight of the competent medical evidence at the time of the July 26, 2004 decision established that appellant could perform the duties of the offered position, appellant did not offer sufficient justification for refusing the offered position. Therefore, the Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective July 21, 2004 as he refused an offer of suitable work.[13] Thus, the Office's July 26, 2004 and February 22, 2005 decisions are correct under the law and facts of this case.[14]

CONCLUSION

The Board finds that the Office properly terminated appellant's monetary compensation benefits effective July 21, 2004, on the grounds that he refused an offer of suitable work and submitted insufficient medical evidence establishing that he was disabled from performing the offered modified-duty position.

[13] *Karen L. Yaeger*, 54 ECAB ___ (Docket No. 02-499, issued January 7, 2003).

[14] The Board notes that as the sanctions under section 8106(c)(2) of the Act were properly applied, appellant is not entitled to receive further compensation, including the April 25, 2005 schedule award. *Stephen R. Lubin*, 43 ECAB 564 (1992).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 22, 2005 and July 26, 2004 are affirmed.

Issued: October 5, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board