United States Department of Labor
Employees' Compensation Appeals Board

WILLIE LUNKIN, Appellant	)	
and	)	**Docket No. 06-603**
	)	**Issued: July 13, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Oakland, CA, Employer	)	

Appearances:
Willie Lunkin, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge

JURISDICTION

On January 20, 2006 appellant filed an appeal of a January 24, 2005 decision in which a hearing representative of the Office of Workers' Compensation Programs affirmed a January 24, 2004 decision which terminated appellant's wage-loss compensation 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 the case.

ISSUE

The issue is whether the Office properly terminated appellant's wage-loss compensation effective January 28, 2004 pursuant to 5 U.S.C. § 8106(a).

FACTUAL HISTORY

On July 29, 1999 appellant, then a 56-year-old mail clerk, filed a Form CA-2, occupational disease claim, alleging that factors of employment caused numbness in his left hand and forearm. He did not stop work.[1] On August 27, 1999 he filed a Form CA-1, traumatic

[1] This claim was adjudicated by the Office under file number 131194374.

injury claim, alleging that he sustained a left hand injury that day. This claim was accepted for left hand and arm strain. While driving to scheduled physical therapy on September 27, 1999, appellant was involved in a motor vehicle accident and underwent knee surgery that day. On December 16, 1999 he returned to work, and on December 21, 1999, the Office accepted that the knee injury was a consequence of the left hand/arm strain.[2] He was granted a schedule award for a 14 percent permanent impairment of his left leg. On August 15, 2000 the Office accepted that appellant sustained occupational diseases of bilateral cubital and carpal tunnel syndrome, and bilateral de Quervain's stenosing tenosynovitis. Appellant stopped work on October 20, 2000 and has not returned.

Appellant came under the care of Dr. Richard A. Nolan, a Board-certified orthopedic surgeon, who performed surgical procedures on October 23, 2000, September 24, 2001 and August 19, 2002, and advised that appellant was totally disabled.[3] The Office continued to develop the claim, and on January 27, 2003 referred appellant, along with a statement of accepted facts, the medical record and a job description for a data conversion operator/video coding technician (VCT) to Dr. Thomas D. Schmitz, also Board-certified in orthopedic surgery.[4] In a report dated February 10, 2003, Dr. Schmitz noted his review of the record provided and that appellant was right-handed. Examination findings included tenderness with Phalen's test and a positive Tinel's test with some tingling into fingers three and four and decreased grip strength on the left. Dr. Schmitz diagnosed status postoperative bilateral carpal tunnel releases and de Quervain's tenosynovitis on the left. In an attached work capacity evaluation, he advised that appellant could work as a VCT for eight hours a day with repetitive wrist motion restricted to one hour per day and pushing, pulling and lifting restricted to five pounds for four hours per day.

By letter dated March 3, 2003, the Office requested that Dr. Nolan review Dr. Schmidt's report, and in reports dated March 3 and April 23, 2003, Dr. Nolan provided examination findings and advised that appellant was totally disabled.

Finding that a conflict existed between the medical opinions of Dr. Nolan and Dr. Schmidt regarding whether appellant could perform the VCT position, on June 23, 2003, the Office referred appellant to Dr. John W. Batcheller, Board-certified in orthopedic surgery, for an impartial evaluation. On July 10, 2003 appellant filed a schedule award claim, and on August 11, 2003, the Office referred him to Dr. John R. Chu, also a Board-certified orthopedic surgeon, for an impairment evaluation of his elbows, wrists and hands. By reports dated

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[2] The accepted knee condition was intrapatellar tendon rupture and patellar fracture with repair. This claim was adjudicated by the Office under file number 131197572.

[3] On May 8, 2002 appellant filed a schedule award claim and, in a November 6, 2002 letter, the Office advised him that his case was not in posture for a schedule award as maximum medical improvement had not been reached.

[4] The job description, provided by the employing establishment, noted general duties that the worker read addresses into a headset microphone as individual pieces of mail were displayed on a computer screen. The worker could sit or stand as needed for comfort and would get a five-minute break each hour and a half-hour lunch during an eight-hour shift. The physical requirements were the ability to see a computer screen and read displayed text and the ability to speak with voice recognition software provided. The work duties did not require any use of the hands with no manual mail handling required. The work was to be in an indoor environment with no identified environmental hazards, and it was noted that subway and shuttle transportation was available.

August 26 and 27, 2003, Dr. Chu advised that appellant had no hand pathology and had not reached maximum medical improvement regarding his wrists and elbows.

In a September 8, 2003 report, Dr. Batcheller noted his review of the record provided, appellant's history and treatment, and his complaints of constant bilateral throbbing in the hands with numbness in the ulnar two fingers on the left. He advised that appellant was right-hand dominant and noted well-healed surgical scars over the proximal palms of both hands and over the radial aspect of the wrists bilaterally. Upper extremity examination demonstrated no joint deformity, laxity or restriction of motion. Mechanics of motion were normal and there was no evidence of wasting or limb asymmetry. Motor function and strength were normal and equal bilaterally, and sensory and vascular function was within normal limits. Vibratory and position senses in the upper extremities were intact, and color, sweating, temperature and capillary filling of the hands was normal bilaterally. Tinel's and Phalen's tests were negative, and deep tendon reflexes were 1+ bilaterally at all points. Grip strength was decreased on the left which, the physician advised, showed poor effort on appellant's part. His impression was status postoperative bilateral carpal tunnel release and bilateral release procedures for de Quervain's tenosynovitis with a second redo procedure on the left. Dr. Batcheller advised that appellant was "perfectly capable" of performing unrestricted duty for eight hours a day as a VCT since this job did not require vigorous repetitive use of the hands and he could take breaks every hour and sit or stand as needed for comfort. He concluded that appellant had very little in the way of objective findings on examination that would substantiate his continuing complaints, noting that, as he had been retired since December 2000 and had diabetes, the source of his complaints was questionable.

By letter dated September 17, 2003, the Office requested that Dr. Nolan review Dr. Batcheller's report. Electromyography (EMG) dated September 23, 2004 demonstrated persistent mild carpal tunnel syndrome with possible diffuse peripheral neuropathy. In an October 13, 2003 treatment note, Dr. Nolan provided examination findings. On December 4, 2003 the Office again requested that Dr. Nolan review Dr. Batcheller's report and the employing establishment offered appellant the position of VCT. In a December 8, 2003 letter, the Office advised appellant that the position offered was suitable, based on Dr. Batcheller's referee opinion. He was notified of the penalty provisions of section 8106 of the Federal Employees' Compensation Act[5] and given 30 days to respond. In a letter dated January 7, 2004, appellant declined the offered position, arguing that, since he was retired, section 8106 did not apply. He stated that he was not physically capable of performing the position and that his medication made him lethargic. Appellant also submitted a November 19, 2003 treatment note in which Dr. Nolan noted his complaint of bilateral wrist pain aggravated by repetitive movement. Examination findings included decreased grip strength on the right and a mildly positive Tinel's on the left with mild tenderness at the medial condyle.

By letter dated January 9, 2004, the Office advised appellant that his reasons for refusing the offered position were not acceptable and he was given an additional 15 days to respond. In response he submitted a December 24, 2003 treatment note in which Dr. Nolan noted his review of Dr. Batcheller's opinion that appellant could work eight hours of modified duty. Dr. Nolan

[5] 5 U.S.C. §§ 8101-8193.

noted findings on examination and advised that, because of appellant's EMG findings of bilateral carpal tunnel syndrome, he could not perform the VCT position as it required repetitive upper extremity use.

In a January 28, 2004 decision, the Office terminated appellant's wage-loss compensation on the grounds that he declined an offer of suitable work.[6] Appellant requested a review of the written record, and submitted treatment notes from Dr. Nolan dating from January 28 through December 8, 2004 in which he noted examination findings. In reports dated February 25 and March 24, 2004, the physician advised that appellant was totally disabled. By decision dated January 24, 2005, an Office hearing representative affirmed the January 28, 2004 decision.

LEGAL PRECEDENT

Section 8106(c) of the Act provides in pertinent part, "A partially disabled employee who (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation." It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[7] To justify such a termination, the Office must show that the work offered was suitable.[8] The implementing regulation 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 a showing before entitlement to compensation is terminated.[9] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[10] In determining what constitutes "suitable work" for a particular disabled employee, the Office considers the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors.[11] 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.[12]

The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence.[13] In situations where there are opposing medical reports of virtually equal

[6] Appellant elected civil service retirement on January 24, 2004.

[7] *Joyce M. Doll*, 53 ECAB 790 (2002).

[8] *Id.*

[9] 20 C.F.R. § 10.517(a).

[10] *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[11] 20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB ____ (Docket No. 04-584, issued September 2, 2004).

[12] *Gloria G. Godfrey*, 52 ECAB 486 (2001).

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

weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[14]

ANALYSIS

In the present case, the Office determined that a conflict in the medical evidence was created between the opinions of appellant's treating physician Dr. Nolan, and Dr. Schmidt, who provided a second opinion evaluation for the Office. The conflict arose as to whether appellant could perform the offered VCT position. The Office then properly referred appellant to Dr. Batcheller, Board-certified in orthopedic surgery, for an impartial evaluation.[15]

The Board finds Dr. Batcheller's report is sufficiently well rationalized to establish that appellant could perform the VCT position offered to appellant on December 4, 2003. The general duty requirements were that the employee read addresses into a headset microphone as individual pieces of mail were displayed on a video screen. The employee could sit or stand as needed for comfort with five-minute breaks each hour. The physical requirements were the ability to see a computer screen and read displayed text, the ability to speak with voice recognition software provided, and no use of the hands and no mail handling in an indoor environment with no identified environmental hazards. In a September 8, 2003 report, Dr. Batcheller noted examination findings and diagnosed status post bilateral carpal tunnel release and bilateral release procedures for de Quervain's tenosynovitis. He advised that appellant was capable of performing unrestricted duty for eight hours a day as a VCT since this job did not require vigorous repetitive use of the hands and could take breaks every hour and sit or stand as needed for comfort. Dr. Batcheller concluded that appellant had very little in the way of objective findings on examination that would substantiate his continuing complaints, noting that, as appellant had been retired since December 2000 and had diabetes, the source of his complaints was questionable.

Where the Office shows that an offered limited-duty position was suitable based on the claimant's work restrictions at that time, the burden shifts to the claimant to show that his or her refusal to work in that position was justified.[16] Dr. Nolan provided a number of reports, in most he only noted examination findings, and in some reported that appellant was totally disabled. In a December 24, 2003 report, the physician noted his review of Dr. Batcheller's report and advised that, because of appellant's EMG findings of bilateral carpal tunnel syndrome, he could not perform the VCT position because it required repetitive upper extremity use. The VCT position, however, does not require the use of hands. Furthermore, Dr. Nolan had been on one side of the conflict in medical evidence, and a subsequently submitted report is generally not sufficient to overcome the weight of impartial specialist's reports or to create a new conflict of medical opinion.[17] The Board thus finds Dr. Nolan's December 24, 2003 report insufficient to

[14] *Manuel Gill*, 52 ECAB 282 (2001).

[15] *Id.*

[16] *Joan F. Burke*, 54 ECAB 406 (2003).

[17] *Michael Hughes*, 52 ECAB 387 (2001).

overcome the weight accorded Dr. Batcheller as the impartial medical specialist,[18] and the medical evidence of record establishes that appellant was capable of performing the VCT position.

In order to properly terminate appellant's compensation under section 8106, the Office must provide appellant notice of its finding that an offered position is suitable and give appellant an opportunity to accept or provide reasons for declining the position.[19] The record in this case indicates that the Office properly followed the procedural requirements. By letter dated December 8, 2003, the Office advised appellant that a partially disabled employee who refused suitable work was not entitled to compensation and that the offered position had been found suitable. He was notified of the penalty provisions of section 8106 and allotted 30 days to either accept or provide reasons for refusing the position. In a letter dated January 7, 2004, the Office advised appellant that the reasons given for not accepting the job offer were unacceptable. He was given an additional 15 days in which to respond. There is, therefore, no evidence of a procedural defect in this case as the Office provided appellant with proper notice. He was offered a suitable position by the employing establishment and such offer was refused. Thus, under section 8106 of the Act, his compensation was properly terminated on January 28, 2004.[20]

Finally, the Board notes that on appeal appellant argues that he is entitled to a schedule award. The penalty provision of section 8106(c) may serve as a bar to compensation for a schedule award for the period after a termination of compensation based on a claimant's refusal to accept an offer of suitable employment, it does not mean that he or she is entitled to no benefits at all under section 8107 for the period prior to the termination.[21] The facts in this case, however, show that, while appellant filed a schedule award claim on July 10, 2003, prior to the termination of his benefits on January 28, 2004 based on his failure to accept an offer of suitable employment, there is no medical evidence to establish entitlement to a schedule award. In reports dated August 26 and 27, 2003, Dr. Chu analyzed appellant's upper extremities. He advised that appellant had no hand pathology and had not reached maximum medical improvement regarding his wrists and elbows. It is well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the employment injury,[22] and the determination of whether maximum medical improvement has been reached is based on the probative medical evidence of

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[18] *Manuel Gill, supra* note 14.

[19] *See Maggie L. Moore*, *supra* note 10.

[20] *Joyce M. Doll, supra* note 7.

[21] *Ronald P. Morgan*, 53 ECAB 358 (2002); 5 U.S.C. § 8107.

[22] *James E. Earle*, 51 ECAB 567 (2000).

record.[23] As there is no probative medical evidence establishing that appellant had a ratable impairment prior to the January 28, 2004 termination of compensation, he would not be entitled to a schedule award.

CONCLUSION

The Board finds that the Office properly terminated appellant's wage-loss compensation on January 28, 2004 pursuant to 5 U.S.C. § 8106(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 24, 2005 be affirmed.

Issued: July 13, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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[23] *Mark A. Holloway*, 55 ECAB ____ (Docket No. 03-2144, issued February 13, 2004). The American Medical Association, *Guides to the Evaluation of Permanent Impairment* explain that an impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized. It is understood that an individual's condition is dynamic. Maximal medical improvement refers to a date from which further recovery or deterioration is not anticipated, although over time there may be some expected change. Once an impairment has reached maximum medical improvement, a permanent impairment rating may be performed. *Patricia J. Penney-Guzman*, 55 ECAB ___ (Docket No. 04-1052, issued September 30, 2004).